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IN THE

Supreme Court of the United States

October Term 1959

No. 735

NATALE EVOLA and VINCENT GIGANTE,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT.

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Case Press Inc., 80 Beekman St., N. Y.—BEekman 3-2035

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Natale Evola and Vincent Gigante respectfully show to this Honorable Court, the following:

The Determinations in the Courts Below

Petitioners Natale Evola and Vincent Gigante were convicted on April 3, 1959, after trial before Hon. Alexander Bicks and a jury, sitting in the United States District Court for the Southern District of New York, of the crime of conspiracy to violate Sections 173 and 174 of Title 21, United States Code, prohibiting the unlawful importation, sale, distribution, etc. of narcotic drugs.

Numbers in parentheses refer to pages in the record.

On January 12 ,1960, the United States Court of Appeals for the Second Judicial Circuit, in an opinion by Chief Judge Lumbard of said Court, entitled "United States of Ameriea vs. Alfredo Aviles, et al." No. 355, October Term 1958, Docket No. 25682 (not yet officially reported) petitioners' convictions were affirmed by said Court. A copy of said opinion is attached hereto and made a part hereof. (See Appendix.)

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Rules of the Supreme Court of the United States and Title 28, United States Code, Section 1254(1), on the ground that the United States Court of Appeals for the Second Judicial Circuit has decided Federal questions of substance which ought to be clarified and made more definite and certain, and has decided questions of substance in a manner not in accordance with applicable decisions of this Court.

Application for bail and for a stay of the mandate of the Circuit Court of Appeals for the Second Circuit, made on January 26, 1960 was denied on February 8, 1960, without opinion.

Application for bail pending determination of this petition for a writ of certiorari was made to Mr. Justice Harlan, Associate Justice of this Court, who on February 18, 1960 denied the relief sought with leave to each petitioner to renew said application if his petition for certiorari is granted by this Court.

The Questions Presented for Review

1. As to Petitioner Natale Evola

(a) Whether or not there was sufficient evidence as matter of law as to petitioner Natale Evola to warrant an inference of his participation in the alleged conspiracy, and whether, based upon the evidence admitted against him, his conviction was in violation of due process of law.

(b) Whether or not the Trial Court committed reversible error by permitting the chief Government witness to suspend his cross-examination at a crucial point by assigning counsel to advise him and by granting him an opportunity to communicate with his wife and daughter before resuming his cross-examination, thus depriving petitioner of due process of law.

2. As to Petitioner Vincent Gigante

(a) Whether or not submission of the case to the jury based upon the chief Government witness' testimony as to petitioner Gigante violated petitioner's rights to due process of law.

Applicable Constitutional Statutory Provisions

(a) Constitution of the United States, Section 1, Fourteenth Amendment:

> "* * * nor shall any person be deprived of life, liberty or property without due process of law."

Statutes Involved

Section 371 of Title 18, U. S. C., provides that:

> "If two or more persons conspire either to commit any offense against the United States, or any agency

thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy * * * " they shall be liable to the penalties stated in the statute.

Section 173 of Title 21, which appellant was charged with conspiring to violate, states, in pertinent part:

> "It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction * * *."

And Section 174 provides that it is unlawful for any person to:

> "fraudulently or knowingly import, or bring any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or to conspire to commit any of such acts in violation of the laws of the United States."

Argument

The indictment charges that between February 1, 1955 and continuously thereafter up to and including the date of the filing of the indictment on July 7, 1959, petitioners Evola and Gigante together with 35 other defendants and various individuals named as co-conspirators but not as defendants, and with divers other persons to the Grand Jury unknown, "unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code."

The indictment further charges that:

"It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, possess, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States, contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

"It was a part of said conspiracy that the said defendants and co-conspirators would unlawfully import, smuggle, and clandestinely introduce large amounts of narcotic drugs into the United States from and through Cuba, Puerto Rico, Mexico, and other countries to the Grand Jury unknown.

"It is further a part of said conspiracy that said defendants and co-conspirators would dilute, mix, and adulterate said illegally imported narcotic drugs prior to their distribution throughout the United States.

"It was further a part of said conspiracy that said defendants and co-conspirators would unlawfully distribute quantities of narcotic drugs, the amounts of which are to the Grand Jury unknown, throughout the United States, to wit: New York City, New York; Chicago, Illinois; Las Vegas, Nevada; Philadelphia, Pennsylvania; Cleveland, Ohio; and other cities and states to the Grand Jury unknown.

"It was further a part of said conspiracy that the defendants and co-conspirators would misrepresent, conceal, hide and cause to be misrepresented, concealed and hidden, the purpose of the acts done in furtherance of the conspiracy."

Out of the 28 overt acts set forth in the indictment, 2 refer to petitioner Evola. They read as follows:

> "14. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July, 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, NATALE EVOLA and VITO GENOVESE went to a bar on 96th Street, in New York City, New York.
>
> "15. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, NATALE EVOLA, SALVATORE SANTORA and [redacted]spirator Robert Roe had a conversation in a ho[redacted]n 85th Street, New York City, New York.

In submitting the case to the jury, the trial judge deleted both overt acts from the indictment and instructed the jury that they were not to consider them.

Out of the 28 overt acts set forth in the indictment, only one refers to petitioner Gigante. It reads as follows:

> "18. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August, 1956, in the Southern District of New York, the defendants, VINCENT GIGANTE, JOHN ORMENTO, and VITO GENOVESE, drove on the West Side Highway, New York City, New York."

The indictment was severed as to 20 defendants, leaving 17 who stood trial. One of the 17, Joseph Vento, was acquitted by the trial court. Another of the defendants, Louis Fiano, was acquitted by the jury.

PETITIONER NATALE EVOLA's POINT No. 1

Cantellops' testimony as to petitioner Evola is insufficient as a matter of law to warrant an inference of participation in the conspiracy charged in the indictment.

Petitioner Evola has never before been convicted of any crime (R. 1148a). His conviction in this case turns solely on the uncorroborated and worthless word of Nelson Cantellops, whose rank perjuries and vicious criminality are fully discussed in the briefs submitted by counsel for other petitioners.

An examination of Cantellops' testimony both at the trial and before the grand jury reveals that Cantellops falsely substituted Evola's name in place of Galante and Santora.

On direct examination, Cantellops testified that in August, 1956, he, Ormento and an unidentified "Mexican", whose name he did not know and to whom he referred as "Mexico", had a discussion concerning his making a trip to Mexico to pick up narcotics (R. 296a-297a). Cantellops said that he refused to go, but agreed to meet them on the following day. The next day, he says, he was picked up by Ormento, the Mexican and Mazzie, and that the group was later joined by *Galante* (R. 297a-298a). This group went to an alleged hotel on 85th Street where the Mexican lived with his wife (R. 299a). In the hotel room they again discussed the proposed trip to Mexico, but Cantellops still refused to go (R. 299a-300a). However, he again agreed to meet with the group the next day (R. 300a-301a).

At the alleged meeting on the following day Cantellops eliminated Galante and substituted Evola (R. 301a):

> "Q. Were you introduced to Evola at this time? A. Yes.
>
> "Q. Who introduced you? A. Ormento.
>
> "Q. How were you introduced? A. He said, 'Nelson, this is Evola. Evola, this is Nelson', and they call him Joe.
>
> "Q. Joe what? A. Later on I hear everybody call him Joe Diamond.
>
> "Q. And did you address him as Joe? A. Yes" (R. 301a).

On cross-examination, Cantellops admitted that before the grand jury on March 20, 1958, he had testified as follows (R. 711a-712a):

> "'Q. Where did this transaction take place? A. This time I got the money in the Mexican apartment.
>
> 'Q. On 85th Street? A. Yeah.
>
> 'Q. Or around 85th Street? A. In 85th Street.
>
> 'Q. Who was present? A. Another old man with him. I think his name was *Galente*.
>
> 'Q. *G-a-l-e-n-t-e*. Did they use a nickname in referring to this old man or any other name? A. I don't know, but I think they called him "*Joe*" some place, something like that.
>
> 'Q. Joe? A. I don't remember, but I think it was Joe.
>
> 'Q. Will you describe this old man? A. He has a round face, thin hair, heavy, short nose—how you call a stocky type, a short fellow?
>
> 'Q. He was short and stocky? A. Not my short, not short like me, but short in comparison with the average—
>
> 'Q. Medium height? A. Medium height.

'Q. You say that they called this man Joe—did they ever call this man Carmine, in addition to calling him Joe? A. Carmine?

'Q. Yes. A. No. I know Carmine.

'Q. Did they ever call this man Lillo, L-i-l-l-o? A. No.

'Q. *When they called this man Joe, could they have called him Joe Diamond, and could you be referring to Natale Evola'—spelled by the Assistant United states Attorney—'N-a-t-a-l-e E-v-o-l-a?* A. In order to identify more clearly, through a picture I identify the man better. *It is too long ago, and I can't place him.*'

"Were you asked those questions before the Grand Jury by Assistant United States Attorney Shaw on March 20, 1958, and did you make those answers; yes or no? A. Yes, that was my best recollection." (Emphasis added)

The record further shows that Cantellops' identification of Evola before the grand jury was induced by showing him a picture (R. 722a) *with the name "Natale Evola" written thereon* (R. 722a). All other pictures shown to him had no names on them, except one with the word "Polizar" (R. 724a).

Cantellops also admitted that on March 20, 1958, he testified before the grand jury that at the second meeting in the Mexican's hotel the persons present were "*Santora, Ormento, the Mexican and myself*" (R. 715a) and that at this meeting "*it was Santora* who made the proposition why the trip couldn't be done through Miami" (R. 715a-716a).

At the trial he brought Evola into the meeting at the hotel and testified that "Evola proposed that why don't they do it like I say through Miami" (R. 714a).

In this connection it is important to emphasize that Cantellops identified the hotel as the Del Rio Hotel on 85th Street toward West End Avenue. The owner of the hotel, however, called as a witness for the defense, produced his records and testified that there was no Mexican living at this hotel during the summer of 1956 and that it was then not a transient hotel but "a permanent hotel" (R. 950a-958a).

The only other testimony where Cantellops mentions Evola is his assertion that sometime in the middle of August, 1956, and toward the end of August or early September, 1956, he met Evola. On the former occasion, at an alleged meeting in a park on 81st Street and Columbus Avenue, Evola told Ormento that "they had a new place to make a delivery" in Brooklyn and that he would turn over money later (R. 318a-321a).

On the alleged second meeting with Evola, Cantellops asserted that in late August or early September, 1956, Evola was present with Ormento, Galante, Papadio and others in a house in the Bronx, where "sealing" of territory was discussed by buying up the Spanish policy banks and that Evola and Papadio said that it would take about a month or a month and a half to do it (R. 347a).

This testimony was flatly contradicted by Cantellops himself when he later said that during this period of time he was in Puerto Rico:

> "Q. Now, Mr. Cantellops, do you remember telling this jury about a trip to Puerto Rico? A. Yes.
> "Q. When was that? A. The end of August or the beginning of September, 1956" (R. 725a).

Cantellops' performances under oath demonstrate an amazing facility for mixing fact with fiction and substituting one man for another, depending upon his arbitrary choice. Thus, he testified that Galente was the "Joe" whom he met at the "Mexican's" hotel and that Evola was the "Joe" whom he met; that "it was Santora who made the proposition why the trip couldn't be done through Miami" and that "Evola proposed that why don't they do it like I say through Miami".

Such testimony is no evidence in the eyes of the law:

> "He who under one oath knowingly affirms a proposition, and under another oath knowingly negates the same proposition, is not to be credited in either instance. The one statement neutralizes the other; and in a court of justice his evidence is entitled to no weight unless corroborated."
>
> *Johnston* v. *Sochurek* (104 Ill. App. 350, 352).

> "If the proof of the fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way. * * * If a plaintiff should testify with equal positiveness that defendant stole his horse and that some third person stole his horse, no one would doubt that the case ought not to go to the jury."
>
> *Johnston* v. *Cincinnati N. O. & T. P. Ry Co.*, 240 S. W. 429, 436.

Cantellops' perjury at the trial is further demonstrated by his testimony that the hotel where he allegedly met and conferred with Evola and others was the Del Rio Hotel on

West 85th Street, and that he pointed out the hotel to agents of the United States Attorney's office (R. 609a, 707a, 817a-820a).

This testimony was in direct conflict with the prosecutor's representation, made in the absence of the jury, that Cantellops "pointed out one or two hotels, but was not certain that that was the hotel", that "the witness could make no positive identification of the hotel" and that therefore the Government's bill of particulars merely stated that the hotel was "between West End Avenue and Riverside Drive". (R. 821a-822a).

In these circumstances, counsel for Evola urged that it was incumbent upon the Government to inform the jury that in this respect Cantellops committed perjury at the trial. The prosecutor, however, refused:

> "Mr. Londin: I decline to impale myself on the horns of a dilemma. The witness has so testified and, that is the testimony in this case" (R. 826a).

Such self-contradictory testimony by a perjuror who had not the slightest compunction of lying under oath, does not constitute substantial evidence for submission to a jury. All other testimony in the massive record of over 5,000 pages is barren of any reference to Evola. Cantellops' assertions as to Evola, it is submitted, are insufficient in law to connect Evola with the gigantic conspiracy alleged in the indictment.

PETITIONER NATALE EVOLA's POINT No. 2

The trial court committed reversible error by permitting Cantellops to suspend his cross-examination at a crucial point, by assigning counsel to advise him and by granting him an opportunity to communicate with his wife and daughter before resuming his cross-examination.

During the cross-examination of Cantellops, counsel for petitioners Evola and Gigante sought to show that the witness had received some promise from the Government that he would be released from prison by Christmas 1958, after the conclusion of his testimony and before the expiration of his present sentence, this being the time it was then reasonable to believe that this trial would be ended. In this connection the witness was being questioned as to whether or not he had ever informed his daughter, in a letter which he identified as being in his own writing, that he was going to be released from prison around Christmas. Instead of answering the question the witness interrupted his cross-examination and requested an "investigation" as to how the letter came into the possession of defense counsel. After a recess and after extended argument on this and another matter, the United States Attorney informed the Court that the witness Cantellops refused to testify further unless he saw his daughter and that he expressed concern for his daughter's safety. The Court ruled, over the objection of defense counsel, that the sequestration rule under which the witness was testifying would be relaxed and that the witness would be permitted to visit with his daughter, if she consented. The Court set certain specific conditions under which arrangements were to be made for the witness to visit with his daughter. The Court also denied defense counsel's application to restrict

the conversation between the witness and his daughter to the topic of the daughter's health and safety and to omit any discussion between them as to the letter or the subject matter of this case.

Counsel was subsequently informed that the instructions of the Court as to the arrangements for the witness' visit with his daughter were not followed but that the witness was permitted to speak with his daughter over the telephone.

At the morning session following the witness' refusal to continue his cross-examination, the Court informed counsel the witness desired to speak with the Court; that the Court was not disposed to speak to the witness except in the presence of counsel and that the Court had requested Arnold Fraiman, Esq., of Dewey, Ballantine, Bushby, Palmer, Wood and Fraiman to serve as counsel to the witness if the witness so desired and that said counsel was present in Court.

Thereafter the witness was brought into the courtroom and stated that he requested to speak to the Court because although there was "nothing wrong with the letter" he was "concerned with the method used to obtain the letter" and that he made this "explanation" so that the Court could refer the matter to the proper authorities. The witness then agreed to confer with the Court appointed counsel after the afternoon session that day.

His cross-examination concerning the letter was thereupon resumed.

It should also be pointed out that there was in fact no illegality in the defense's acquisition of the letter which

had been given to the defense counsel by the witness' daughter who gave it to her brother who later testified in behalf of the defense.

It is apparent from the above brief resume of what transpired at this point in the trial that the procedure adopted by the Court constituted error which was extremely prejudicial to all defendants. It is to be noted that at this crucial point in the trial, when this witness was being asked simple questions concerning a letter admittedly written by him which indicated a hope of reward and went to the core of his motives and interest in testifying for the Government and affected the credibility of his entire testimony, nevertheless, the Court permitted this witness to interrupt his cross-examination and impose certain conditions upon the resumption of his cross-examination.

The following objections were properly raised by defense counsel to the Court's action:

1. Defendants' cross-examination of this Government witness on a vital issue with proper questions was unnecessarily interrupted, and defense lost the advantages and effect of having the witness confronted with his own written statement, then and there in open Court, without delay and without imposition of his own or the Court's conditions.

2. Defendants were thus deprived of their constitutional right to "due process" in the cross-examination of this key Government witness.

3. The rule of sequestration as to this witness was unnecessarily and improperly violated.

4. The witness should have been directed to answer proper questions addressed to him on cross-examination without the assignment of counsel because the questions and

the witness' "explanation" in no way involved his constitutional privileges, and he made no request for the appointment of counsel to protect his constitutional rights.

5. The assignment of counsel thus fortified the witness to continue his blatant perjury.

In the case of *In re Black*, 47 F. 2d 542, 543, the Court wrote:

> "Neither at a trial nor before a grand jury is he (a witness) entitled to have the aid of counsel when testifying."
>
> * * * * *
>
> "A witness is not entitled to be furnished with facilities for evading issues or concealing true facts."

To permit a witness to suspend his cross-examination so as to enable him to contrive means of coping with counsel's questions and to supply an attorney to advise him is wrong. See, *In re Groban*, 352 U. S. 330, 333, footnote 5.

A defendant must be afforded effective opportunity to cross-examine the government's witness. A day's suspension of cross-examination in the circumstances revealed in this case was destructive of its potency, giving the witness an opportunity to improvise an explanation and bolster his version of events by a contrived showing of verisimilitude, and hence not qualify as a "reasonable opportunity" for cross-examination (*Reilly* v. *Pinkus*, 338 U. S. 269).

Where a witness during his testimony, raises the question of his constitutional rights and privileges, that becomes a matter solely for the Court to decide (*United States* v. *Costello*, 222 F. 2d 656; *Wollam* v. *United States*, 244 F. 2d 212).

PETITIONER VINCENT GIGANTE's POINT No. 1

Cantellops' testimony as to petitioner Gigante was wholly insufficient as a matter of law to warrant submission of the case to the jury.

Cantellops was the only witness against Gigante, and what he said is so patently insufficient to connect him as a co-conspirator that it is difficult to understand how any court could submit his case to a jury. The only possible explanation of the verdict is that he was swamped by a mass of approximately 5,000 pages of testimony with which he had no relation whatever.

Cantellops' entire testimony at the trial as to Gigante is as follows:

He said on direct examination that sometime in July, 1956, Carmine Polizzano asked him to take a trip to Cleveland, Ohio (R. 288a). On the following day Polizzano told him he would be driven "by somebody up to a certain point" and that from there he was to take a bus to a hotel in Cleveland where he would meet Charlie Brody (R. 288a-290a).

As Cantellops was receiving these instructions, a car allegedly came driving through the street and stopped a few feet away from them. Thereupon, said Cantellops, Polizzano "told me that is the fellow that will drive you; on your way you make acquaintance with him and he will let you know where to get off and what to do next" (R. 290a).

Cantellops identified Gigante as the fellow in the car. He testified that Gigante was introduced to him as "Chin",

and that upon entering the car "we started driving off" (R. 291a).

Gigante, he said, drove him to Lorain, Ohio, about one hour's ride from Cleveland (R. 292a), and described his conversations on the trip as follows (R. 291a-292a):

> "Q. Mr. Cantellops, at the noon recess or just before the noon recess I asked you about the conversations that you had with the defendant Gigante in the car on the way to Cleveland.
>
> Now, will you tell us what he said to you and what you said to him as best you can recall. A. I explained my invention to him and I asked him what was his opinion. Then he asked me if I knew certain people. He mentioned—
>
> * * * * *
>
> A. (Continuing) He asked me if I knew Big John, Joe Beck, a fellow named Tom Meeks, The Right Man, and lots of people. I said I knew only a few of them.
>
> Q. What did you say to him? A. After that I told him that I saw no reason taking chances in dope when this invention of mine could provide a big amount of income, of money.
>
> Q. What did you say to him about the names that were mentioned? A. Well, the one that I knew I said that I knew; of the ones I didn't know, I told him I didn't know.
>
> Q. Whom did you tell him you knew? A. I told him that I knew Big John, Joe Beck, Carmine, and so on—Carmine Polizzano.
>
> Q. And what did you tell him about the other names? A. That I didn't know them, that I never hear about them.
>
> * * * * *

Q. Was there any other conversation that you can recall? A. Yes. He told me that he will put a word with Big John and he will try to make an arrangement for me to be introduced to the Right Man to see if the invention could be worked out."

Cantellops further testified that upon arriving in Lorain, they went to a gas station, and that while the attendant was serving gas, Gigante told him "to go and in the back behind the spare tire where the stuff is, to pick them up and to keep going and take a bus from there to Cleveland" (R. 293a). Thereupon, said Cantellops, "I went to the back of the car, picked the key from the gas cap, opened the trunk and I picked the stuff from behind the spare tire" (R. 293a). He described it as being wrapped "in the shape of a box" ten inches by eight inches, and stated that after taking this box he walked away and took a bus to Cleveland (R. 293a).

Cantellops also testified that in late August or early September of 1956 he had occasion to see Gigante again. He related the following: While driving up the West Side Drive with Ormento, Evola, Papadio and Galante on the way to the meeting on Seymour Avenue the car in which the witness was riding pulled over to an emergency exit on the side of the road and the witness and Ormento entered a second car driven by Gigante which had similarly pulled to the side. When the witness entered this car he was introduced by Ormento to appellant Genovese, to whom he explained his invention. Cantellops added that while in the car, Genovese told him that they were going to a meeting at which territorial control would be discussed and that Cantellops was being depended upon to offer his assistance. He was also told that by helping out he could earn suffi-

cient funds to enable him to proceed to have a sample of his invention made after which they would take care of the rest (R. 337a-340a).

It is from this testimony that the trial court submitted to the jury the question whether Gigante knowingly became a member of the conspiracy charged in the indictment (R. 1099a-1101a).

Cantellops' perjury is revealed by the fact that before the grand jury he testified that he traveled to Cleveland from New York *alone by bus*, making "a big change in Pittsburgh" (R. 629a, 738a). On cross-examination his testimony was (R. 626a-629a):

> "Q. Did you ever swear before a jury or a grand jury, rather, a grand jury, that you took this trip by bus; yes or no? A. Yes, I reached Cleveland by bus.
>
> Q. If you will just listen to me: Did you ever swear before the grand jury that you made this Cleveland trip by Greyhound bus; yes or no? A. Yes.
>
> Q. Tell us the details of what you said to the grand jury about your trip by bus to Cleveland, when you testified about the Cleveland trip by bus—tell us what you told the grand jury, everything you told the grand jury about that trip to Cleveland, and I will tell you the date, when I want you to do that.
>
> Mr. Christy: Objection, your Honor.
>
> The Court: Let us get the facts. Did you go by Greyhound bus?
>
> The Witness: Now, I correct that mistake, and I rectify it—
>
> The Court: Did you go by Greyhound bus?
>
> The Witness: No, by bus from Lorain to Cleve-

land, but I was riding by car from here to Lorain, Ohio.

The Court: Did you ever testify before the Grand Jury that you had gone by Greyhound bus straight from New York through to Cleveland?

The Witness: *Yes, your Honor, and I had a reason to do it and I did it and I am sorry for it.*"

* * * * *

"Q. May I refresh your recollection? Were you asked these questions and did you make these answers before the Grand Jury—

Mr. Christy: What page?

Mr. Edelbaum: Page 193:

Q. —'Q. Where did Carmine take the package from which he gave you? A. From the basement in that plant.

'Q. Did you go into the basement with him? A. No.

'Q. You stayed outside? A. Yes.

'Q. And he came out of the basement with this package? A. Yes.

'Q. Now, how did you travel to Cleveland? A. *By bus; I make a big change in Pittsburgh.*'

'Were you asked those questions and did you make those answers to Assistant District Attorney Shaw on March 20, 1958? A. Well, *the trip is truthful but*—

The Court: Mr. Witness, you heard the questions that were put to you and the answers that you gave. Were those questions put and did you make the answers as read to you by Mr. Edelbaum?

The Witness: Yes." (Emphasis supplied)

If we stretch Cantellops' testimony at the trial to the limit, it could not be deemed sufficient in law to justify an

inference that he knowingly became a member of the conspiracy or with knowledge thereof aided and abetted its purposes. Cantellops' testimony is barren of proof that Gigante knew the purpose for which Cantellops was going to Cleveland. Nor is there sufficient evidence to show that Gigante knew what was in the box, or had any knowledge of the overall conspiracy alleged in the indictment. At best, even if Cantellops' recantation of his grand jury testimony be accepted, it represents nothing than an isolated transaction which as a matter of law fails to make him a member of the conspiracy charged. (*United States* v. *Reina*, 2d Cir., 242 F. 2d 302; *United States* v. *Dellaro*, 2d Cir., 99 F. 2d 781, 783.) As stated by this Court in *United States* v. *Euphemia*, 2d Cir., 261 F. 2d 441, 442:

> "The Government was required to show more than that Euphemia was acquainted with Perna or that the two men were friends. Euphemia's explanations and Rosalie Orso's story may be unworthy of belief, but it is our opinion that the Government failed to produce any testimony linking Euphemia's actions on the night of November 13 to the criminal activities of Mario Perna on that evening. Proof that the defendant knew Perna and rode seventy blocks in the same vehicle with him does not appear to be enough here to prove that the defendant was Perna's 'partner' in the illegal sale of narcotics."

Finally, "There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character." (*People* v. *Shilitano*, 218 N. Y. 161, 170.) In this case, we are not dealing with an ordinary

recantation, but with a wretched perjurer whose word is worthless.

WHEREFORE, petitioners Natale Evola and Vincent Gigante respectfully pray that a writ of certiorari may issue out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Judicial Circuit, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause, and a complete transcript of the record and proceedings had herein, to the end that the conviction of petitioners of the crime of violating Sections 173 and 174 of the United States Code, Title 21, and sentencing petitioner Natale Evola to a term of imprisonment for ten years, and sentencing petitioner Vincent Gigante to a term of imprisonment for seven years, may be reversed and that the petitioners may have such other and further relief as to this Court may seem just and proper.

Dated: New York, N. Y.,
February 20, 1960.

Respectfully submitted,

MAURICE EDELBAUM
Counsel for Petitioners

MAURICE EDELBAUM
FREDERICK S. ABRAMS
On the brief

Certification

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari, and in my opinion it is well founded and the cause is one in which petition should be granted.

MAURICE EDELBAUM

SUSAN HUPCHER
Notary Public, State of New York
No. 03-7014500
Qualified in Bronx County
Commission Expires March 30, 1960

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 355—October Term, 1958.

(Argued September 15, 1959 Decided January 12, 1960.)

Docket No. 25682

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFREDO AVILES, CHARLES BARCELLONA, JEAN CAPECE, CHARLES DI PALERMO, JOSEPH DI PALERMO, NATALE EVOLA, VITO GENOVESE, VINCENT GIGANTE, DANIEL LESSA, NICHOLAS LESSA, ROCCO MAZZIE, CARMINE POLIZZANO, RALPH POLIZZANO, BENJAMIN RODRIQUEZ, and SALVATORE SANTORA,

Appellants.

Before:

LUMBARD, *Chief Judge,*
CLARK and MOORE, *Circuit Judges.*

Alfredo Aviles and fourteen other defendants appeal from jury convictions in the Southern District of New York, Alexander Bicks, *J.*, presiding, for conspiracy to violate the Narcotic laws, 21 U. S. C. §§173 and 174, and sentences ranging from five to twenty years imprisonment, alleging

insufficiency of proof of a single conspiracy and various errors in the admission of evidence and the conduct of the trial. Affirmed as to all defendants, except Benjamin Rodriquez whose conviction is reversed.

JEROME J. LONDIN, Assistant United States Attorney, Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., United States Attorney, Herbert B. Greene, Mark F. Hughes, Jr., Robert Price and Robert E. Scher, Assistant United States Attorneys, on the brief) *for appellee.*

SAUL ROTH, New York, N. Y., *for appellant Alfredo Aviles.*

ROY L. REARDON, New York, N. Y., *for appellant Charles Barcellona.*

ALBERT J. KRIEGER, New York, N. Y. (Theodore Krieger, on the brief) *for appellants Jean Capece, Joseph Di Palermo and Benjamin Rodriquez.*

ROBERT R. KAUFMAN, New York, N. Y. (Rudolph Stand, on the brief) *for appellant Charles Di Palermo.*

MAURICE EDELBAUM, New York, N. Y., *for appellants Natale Evola and Vincent Gigante.*

SOLOMON A. KLEIN, New York, N. Y. (Wilfred H. Davis, on the brief) *for appellant Vito Genovese.*

ABRAHAM H. BRODSKY, New York, N. Y., *for appellants Daniel Lessa and Nicholas Lessa.*

HENRY K. CHAPMAN, New York, N. Y., *for appellant Rocco Mazzie.*

DAVID SCHWARTZ, New York, N. Y., *for appellant Carmine A. Polizzano.*

ALLEN S. STIM, New York, N. Y., *for appellant Ralph Polizzano.*

HERBERT S. SEGAL, New York, N. Y. (Osmond K. Fraenkel, on the brief) *for appellant Salvatore Santora.*

LUMBARD, *Chief Judge*:

Alfredo Aviles and fourteen co-defendants appeal their convictions for conspiracy to violate the narcotic laws, 21 U. S. C. Sections 173, 174 and sentences of imprisonment ranging from 5 to 20 years[1] after a three months' jury trial in the Southern District of New York. The indictment named a total of 37 defendants and 14 other co-conspirators, but only 17 defendants stood trial on the charge of conspiracy to import and smuggle narcotic drugs into the United States, to receive, conceal, possess, buy and sell

[1] Charles Barcellona and Jean Capece received five year sentences; Vincent Gigante and Ralph Polizzano received seven years; Carmine Polizzano—eight years; Alfredo Aviles, Natale Evola and Benjamin Rodriquez—ten years; Charles Di Palermo, Nicholas Lessa and Rocco Mazzie—twelve years; Daniel Lessa—fourteen years; Joseph Di Palermo and Vito Genovese—fifteen years; and Salvatore Santora—twenty years. In addition, fines of $20,000 each were levied on Joseph Di Palermo, Natale Evola and Vito Genovese.

the drugs; to dilute, mix and adulterate the drugs prior to their distribution; and to distribute the drugs. Judge Bicks granted the motion of defendant Vento for judgment of acquittal at the end of the case, and the jury acquitted defendant Fiano.

A summary of the evidence shows that there was ample support for the jury's finding of one overall conspiracy to import, distribute, purchase and sell narcotics in violation of law.

The testimony of the principal government witness, Nelson Silva Cantellops, shows that he first joined the conspiracy in March, 1955 and continued serving it in various capacities until July 1, 1957 when he was arrested. His testimony and extensive cross-examination consumed nineteen days of the trial. The government also called defendants Peter Contes, Joseph Basile, and Salvatore Marino who testified that they participated in the sale and distribution of drugs with various appellants, defendants and co-conspirators. The following chronological summary of the evidence of the conspiracy is based on the testimony of Cantellops unless otherwise stated.

In March, 1955 Cantellops attended a meeting at Al's Luncheonette at 34 East 4th Street, New York, with Charles Barcellona, Ralph Polizzano, Carmine Polizzano, Joseph Di Palermo and Anthony Colonna. Cantellops agreed to transport narcotics to Las Vegas for $1000. At the airport bus, while Barcellona was talking to Cantellops, an unidentified man handed Cantellops a package which he took to Las Vegas. In Las Vegas Carmine Polizzano met him and

introduced him to the defendant Fiano to whom he gave the package later that evening. For this delivery of narcotics Cantellops was paid $1000 by Barcellona.

In June, 1955 Cantellops made a trip to Florida to pick up a shipment of narcotics. Carmine Polizzano gave him a bus ticket and money and he went to Miami where he met Carmine Polizzano and drove to Tampa. When the rendezvous in Tampa was unsuccessful, Cantellops and Carmine Polizzano drove to Key West where outside the La Concha Hotel an unidentified man took a suitcase out of his pushcart and placed it in the back seat of the automobile in which Cantellops was waiting. After driving to Miami Cantellops took the train and delivered the narcotics to Ralph Polizzano at the "plant" at 36 East 4th Street, next to Al's Luncheonette, as Carmine Polizzano watched from across the street. For this trip Joseph Di Palermo and Carmine Polizzano paid Cantellops $600 and later he also received an ounce of heroin as a tip.

Cantellops' third trip in August, 1955 took him to Chicago. Carmine Polizzano instructed him about the trip and gave him a package of narcotics from the trunk of a car parked in front of Al's Luncheonette. Cantellops took a bus to Chicago and the day after his arrival met Carmine Polizzano at a bar on Division Street where he was introduced to a man who picked up the narcotics in the booth where Cantellops had placed them. Cantellops and Carmine Polizzano then drove back to New York and, at Joseph Di Palermo's direction, Carmine Polizzano paid Cantellops. Following the Chicago trip, in August and September, 1955, Cantellops distributed narcotics for Ralph Polizzano.

In October, 1955 Carmine Polizzano asked Cantellops to pick up narcotics in Miami. He told Cantellops that if narcotics were not available in Miami he might have to go to Havana to see certain people. Cantellops went to Miami and at the La Concha Hotel met Charles Di Palermo who introduced him to a man named "Cuba." The three men then drove to the La Concha Hotel in Key West and the next day, upon directions from "Cuba," they picked up a suitcase of narcotics in "Cuba's" hotel room and brought the narcotics to New York by train. Back in New York Cantellops delivered the narcotics to Ralph Polizzano at the basement entrance of Al's Luncheonette upon directions from Carmine Polizzano. For this trip Cantellops was paid $250 by Joseph Di Palermo and $350 by Carmine Polizzano, who also arranged for his assistant, John Russo, to give Cantellops an ounce of heroin as a tip.

In October, 1955, upon Carmine Polizzano's directions, Cantellops explored the policy banks in the Eldridge Street area on Manhattan's lower East Side to find out whether these banks might be used as a front for narcotics distributing plants. After Cantellops had explored the policy banks, Carmine Polizzano invited him to a meeting at Ralph Polizzano's apartment on East 4th Street. This meeting was attended by Ralph and Carmine Polizzano, Joseph Di Palermo, John Russo, John Ormento and Benjamin Levine. The group discussed taking over and operating policy banks as a cover for the distribution of narcotics. Cantellops reported that it would cost between $100,000 and $150,000 to purchase the banks in the Eldridge Street area. The group reached no final decision as it was stated that

the matters would have to be discussed with "The Right Man," who, as Cantellops' testimony later developed, turned out to be appellant Vito Genovese. The meeting also discussed the possibility of importing narcotics through Puerto Rico because of turmoil in Cuba and recent misfortunes respecting two shipments by boat. Cantellops suggested the use of the Island of Vieques, off Puerto Rico, as a distributing point.

During the early part of 1956, at the request of Joseph Di Palermo and Carmine Polizzano, Rosario Colletti delivered narcotics to Cantellops who in turn delivered them to John Gonzalez, alias Guayamita, at Gonzalez's apartment at 793 Ninth Avenue, where they were diluted for resale. In June 1956 Cantellops took over Gonzalez' operations and Joseph Di Palermo and the two Polizzanos arranged for Ralph Polizzano to supply Cantellops with the narcotics necessary to expand this business in the Spanish speaking market. Cantellops called Ralph Polizzano when he needed drugs and he picked them up from Russo at Al's Luncheonette or nearby places. While picking up narcotics at the East 4th Street plant Cantellops saw Ralph Polizzano and Charles Di Palermo diluting narcotics. On two occasions during 1956 when Cantellops was in the East 4th Street neighborhood, he saw Vito Genovese talking to Carmine Polizzano and on one of these occasions when Cantellops approached, he was told by Carmine Polizzano "never to interfere when he was talking to 'The Right Man.'" In the summer of 1956 Cantellops, at Ralph Polizzano's request, made other local deliveries of narcotics.

In July, 1956, Cantellops made his fifth out-of-town trip, this time to Cleveland at the behest of Ormento and Carmine Polizzano. Carmine Polizzano introduced Cantellops to appellant Vincent Gigante who drove Cantellops to Lorain, Ohio. At Lorain, Cantellops took the narcotics from behind the spare tire in the automobile trunk and then took them by bus to Cleveland. In Cleveland he met Charles Di Palermo and he delivered the narcotics to an unidentified woman in a taxicab. After Cantellops returned to New York Carmine Polizzano arranged for him to meet Ormento and in Mazzie's presence Ormento paid Cantellops for the trip.

In August, 1956, a sale by Colletti to a narcotic agent resulted in the arrest of Colletti and Russo and the latter was replaced by the defendant Salvatore Marino who thereafter handled narcotics deliveries for the Polizzanos, at the Squeeze-Inn Bar, the plant at 36 East 4th Street and Al's Luncheonette at 34 East 4th Street. Thereafter Marino made frequent deliveries of drugs to Cantellops.

In August, 1956, Cantellops made his third trip to Miami to pick up narcotics. Before the Miami trip there were discussions and meetings at which Ormento offered Cantellops $1,500 to pick up narcotics in Mexico. After Cantellops refused to do this, meetings were held with a man called "Mexican," Mazzie and Carmine Galante regarding the details of a trip to pick up drugs. Cantellops still refused to go to Mexico.

The following evening Cantellops went with Ormento, Mazzie, "Mexican" and the appellant Natale Evola to a

restaurant on East 86th Street. Here Ormento spoke to Genovese and reported back to Cantellops that "The Right Man" wanted to take a look at Cantellops to see if he was all right.

After this Cantellops went to "Mexican's" hotel room somewhere on West 85th Street and discussed the trip to Mexico with the appellant Salvatore Santora, Evola, Mazzie, Ormento and "Mexican." Cantellops persisted in his refusal to go to Mexico but suggested that he go to Miami instead. As the change in plan involved a delay, Ormento gave Cantellops money to entertain "Mexican" in New York City, which Cantellops did for the next three days. After this Cantellops drove with "Mexican" to Miami. The day after their arrival "Mexican" drove Cantellops to Pompano Beach, secured a suitcase in a motel, and gave it to Cantellops. Cantellops then returned to New York by train and later gave the bag to an unidentified man. For this trip Ormento and Mazzie later paid him $950. After this Cantellops made two deliveries of narcotics to Philadelphia. On the first occasion Cantellops delivered three or four pounds of narcotics to a lame man, with Mazzie watching the delivery from a distance. For this Ormento paid Cantellops $350 in the presence of Santora and Mazzie and told Cantellops that Santora would have another trip for him.

A few days later Carmine Polizzano arranged for Cantellops to meet with Ormento, Santora and Mazzie at which time Ormento asked him to deliver narcotics to Philadelphia for Santora. Cantellops was driven to Philadelphia and delivered the narcotics according to instructions. For the

second Philadelphia trip Santora gave money to Ormento who gave it to Cantellops in the presence of Mazzie and Evola. In addition, Cantellops testified to making a Brooklyn delivery for the same group, for which he was paid by Ormento.

In August, 1956, defendant Contes ordered a large quantity of heroin from Nicholas Lessa and Cantellops delivered this to Contes at the request of Mazzie who paid Cantellops for the delivery. The testimony of Peter Contes tended to confirm these transactions.

A few days later Ormento and Mazzie twice sent narcotics to Daniel and Nicholas Lessa, using Cantellops as the messenger. Mazzie supervised the second delivery and Ormento paid Cantellops for both deliveries.

At the end of August, or early September 1956, Cantellops attended a meeting at Mazzie's home at 2332 Seymour Avenue in the Bronx where plans were made for extending the distribution of narcotics. Earlier in the evening Cantellops drove to a German restaurant on East 86th Street with Evola, Ormento, Galante and Andimo Pappadio. After Ormento made a telephone call, they all drove to the West Side Highway and met another car. Cantellops and Ormento entered the other card which was driven by appellant Gigante. Ormento introduced Cantellops to Genovese, who was sitting in the back seat, saying to Genovese "This man is doing a good job for us. He is helping us and doing a good job for us." Ormento told Cantellops "This is the Right Man." Genovese said to Cantellops that they "were going to a meeting where territorial control was to be

discussed," that the people at the meeting were counting on Cantellops to help them and that Cantellops could earn some money by doing so. The two automobiles drove to Mazzie's home and everyone entered except Genovese and Gigante who stayed outside. Evola, Mazzie, Ormento, Pappadio, Galante and Cantellops discussed the distribution of narcotics in the Spanish market in the East Bronx by use of policy banks and sealing off the area to eliminate competing narcotics peddlers and policy banks so that they could control the narcotics traffic in this area. Evola and Pappadio thought that the plan would take a month or a month and a half to complete and the others agreed. After twenty or thirty minutes Genovese came in. He wanted to know "what was the decision in the plan, what they had in mind." When he was told about the discussion which had taken place, Genovese said that he needed this information because he wanted to know when to send his men into the area. Later, in the presence of Evola, Ormento, Pappadio and Galante, Cantellops was advised that he would be the contact man for the distribution of narcotics in this area. Cantellops later delivered narcotics in this area at Ormento's request.

In September, 1956, Ormento and Galante sent Cantellops to Puerto Rico for narcotics. In Puerto Rico he contacted someone named Laurensano who instructed him where to find one Perez on the island of Vieques. When Cantellops met Perez he was given a double marine canvas bag containing narcotics. Cantellops advised Laurensano that he was sending the drugs to three fictitious persons in care of General Delivery, Post Office, New York, and Lau-

rensano advised that he would inform Ormento. Cantellops then mailed the heroin in three packages from three separate post offices. When Cantellops returned to New York Carmine Polizzano arranged to have him meet Ormento who said the drugs had arrived and Ormento paid him for the trip.

After this Cantellops met with Joseph Di Palermo, "Cuba" and a man named Montanez, and Montanez advised that there would be no more shipments from Cuba to Miami and Key West for the rest of the year because of unsettled conditions in Cuba. This meeting took place just a few days before Cantellops was arrested in September, 1956, and he remained in prison until February, 1957.

According to the testimony of three customs inspectors, Joseph Di Palermo, Jean Capece and Salvatore Benanti visited Cuba for two days in November, 1956, and returned to New York on November 20. Jean Capece was searched by a customs inspectress who found $9,000 in new one hundred dollar bills hidden in an undergarment. Jean Capece gave three different stories regarding this money.

When Cantellops left prison in February, 1957, he resumed his narcotics dealings with the Polizzanos, the Di Palermos and Ormento. The appellant Alfredo Aviles became a customer and Cantellops and Marino delivered narcotics to him, Cantellops making his deliveries about once or twice a week from the East 4th Street plant. Aviles paid Cantellops who turned the money over to Ralph Polizzano or Marino and received $100 for each delivery. On one occasion, when Joseph Di Palermo was present, Can-

tellops saw Ralph Polizzano hand to Jean Capece the proceeds of one of these sales to Aviles. Later Aviles bought directly from Ralph Polizzano and Cantellops received commissions on the sales. Aviles in turn resold the drugs which he had purchased from Cantellops and Ralp Polizzano. Marino testified for the government and generally confirmed Cantellops' story about the deliveries and the dealings with Aviles.

Cantellops' fourth and last trip to Miami took place in April, 1957. Joseph Di Palermo and Carmine Polizzano instructed Cantellops to meet Charles Di Palermo in Miami. Carmine Polizzano provided Cantellops with a bus ticket and money and in Miami he met Charles Di Palermo and "Cuba" at the La Concha Hotel. The trio then drove to the La Concha Hotel in Key West. In Key West an unidentified man put luggage in the rear seat of their car and Cantellops and Cuba took this back to Miami in the bus. Here they met Charles Di Palermo and, after rearranging the luggage, Cantellops took the drugs back to New York on the train and delivered them to Carmine Polizzano at the plant on East 4th Street. Later Joseph Di Palermo and Carmine Polizzano paid him about $600 for the trip and he later was given a tip of an ounce of heroin by Marino on Carmine Polizzano's instructions.

At a meeting in May, 1957, in Ralph Polizzano's apartment, there was further talk about sealing up the Eldridge Street territory. Present were Ralph Polizzano, Joseph Di Palermo, Ormento, Cantellops and some friend of Bennie Levine. Cantellops was ordered to start buying up the Spanish policy banks and he attempted to arrange meet-

ings between the owners of these banks and the Polizzanos. Meanwhile Cantellops continued to deliver narcotics for the Polizzanos from the East 4th Street plant until July 1, 1957 when he was arrested.

As we have pointed out, the government called numerous witnesses to corroborate directly and circumstantially the testimony of Cantellops. The three principal supporting accomplice witnesses were Marino, Contes and Joseph Basile, the latter being the same Joseph Basile who was a government witness in *United States* v. *Stromberg*, 268 F. 2d 256, 262 (2 Cir. 1959). Marino testified to a delivery of drugs for Ralph Polizzano on July 5, 1957, and a few hours later the police seized the plant at 36 East 4th Street and found quantities of cocaine and heroin and materials used to dilute, package and distribute these drugs. Marino confirmed Cantellops testimony about the plant at 36 East 4th Street and Al's Luncheonette as centers from which narcotics were distributed by various means. He testified that he delivered narcotics for Ralph Polizzano from the fall of 1956 until his arrest on July 5, 1957.

Peter Contes testified to narcotics transactions involving Daniel Lessa, Nicholas Lessa, Rocco Mazzie and John Ormento. Contes purchased heroin from Daniel Lessa some time later in 1955 or early in 1956 and paid him $900 in the presence of Mazzie and Ormento, after which Nicholas Lessa delivered the narcotics to him. After this Contes made further purchases from Nicholas Lessa in varying amounts up to $2,600. One of Contes' customers was his cousin, Charles Pappalardo, and several days after selling him heroin in April, 1956, both Pappalardo and Contes were

arrested by federal agents who searched Contes' apartment at 318 West 49th Street and found heroin and paraphernalia for diluting and packaging narcotics.

Joseph Basile testified to narcotics dealings which began in August 1955 with the appellant Joseph Di Palermo whom he knew as "Joe Beck." Joseph Di Palermo offered to sell heroin for $8,000 a kilo and cocaine for $400 an ounce. Basile was arrested in November 1955 but jumped bail and went to Europe. When he came back in January of 1956, he ordered half a kilo of heroin and cocaine from Joseph Di Palermo for which he paid $2,000 upon delivery to him by Johnny DePietro, also known as "Johnny The Bug" and the balance of $1,500 at a later date. Basile disposed of the narcotics to his customers. Basile ordered more heroin a few days later at which time Joseph Di Palermo told him that the "goods" came from "Big John" Ormento whom Basile knew. Basile paid Joseph Di Palermo $3,500 in advance for the narcotics which were delivered to him later by Benanti. On another occasion Basile met Joseph Di Palermo and Jean Capece by telephoning Jean Capece at a number which Joseph Di Palermo had given him. Basile ordered half a kilo of narcotics for which he paid $3,500. The narcotics were delivered to Basile in an automobile by "Johnny The Bug" in the presence of Jean Capece and Joseph Di Palermo. Basile took the narcotics to Schenectady and sold it to his customers. He stayed in Schenectady until his arrest on November 10, 1956, but meanwhile he purchased narcotics about once a month from Joseph Di Palermo by telephoning Jean Capece and giving her a message for Joseph Di Palermo or arranging to talk with

him. On one occasion when Basile purchased heroin from Joseph Di Palermo, the package was delivered to him by Charles Di Palermo whom he knew as "Charlie Brody." Basile took the half kilo of heroin to Schenectady and sold it to his customers. On some occasions Joseph Di Palermo delivered narcotics to Basile in New Jersey at the Garden State Diner near the exit of the Garden State Parkway on Route 17.

None of the appellants took the stand before the jury and they called no co-defendant or alleged co-conspirator to rebut directly the strong case of the government.[2]

As is shown by the above summary of the principal testimony in the trial record of over 6700 pages, there was abundant evidence that all of the appellants, except Rodriquez, were part of one conspiracy to import, sell and deliver narcotics. The principal conspirators according to the proof were Vito Genovese, John Ormento, Joseph Di Palermo, Natale Evola, Rocco Mazzie, Carmine Polizzano and Salvatore Santora, among others. Their sources of supply were from such people as James Laurensano, "Montanez," "Cuba" and "Mexican," in Cuba, Mexico and Puerto Rico. According to Cantellops' testimony, he himself went to Puerto Rico and mailed narcotics from there. Of course many of the principal actors not only took part in the importation and transportation of the narcotics,

[2] Only five of the appellants called any witnesses, namely Carmine Polizzano, Mazzie, Gigante, Evola and Rodriquez. These witnesses testified principally regarding Carmine Polizzano's employment, Mazzie's home at Seymour Avenue in the Bronx, Cantellops and his visits to his family, and the Philadelphia neighborhood where Cantellops testified to making a delivery of drugs.

but they had to do with the distribution and delivery of them through others of the appellants such as Jean Capece, Charles Di Palermo, Ralph Polizzano, Vincent Gigante and assistants such as Nelson Cantellops, Salvatore Benanti, John Russo and Salvatore Marino who delivered to Joseph Basile, Peter Contes and William Rovira. The appellant Ralph Polizzano was concerned actively with many of the deliveries and pickups and he seems to have been more or less in charge of the plant and the activities centering around 36 East 4th Street and Al's Luncheonette. Others of the appellants such as Rocco Mazzie and the Lessa brothers, Daniel and Nicholas, had to do with distributing the narcotics to various minor outlets, such as the witness Peter Contes. Others in the group of minor distributors were the appellants Charles Barcellona and Alfredo Aviles.

While the proof is most abundant against those who were active in handling and distributing the narcotics to and from the East 4th Street plant, such as the Polizzano brothers and the Di Palermo brothers, the proof is also sufficient against those who were concerned with the planning and the strategy of the conspiracy and the expansion of its business such as Vito Genovese and Natale Evola.

Although there is no proof that Vito Genovese ever himself handled narcotics or received any money, it is clear from what he said and from his presence at meetings of the conspirators and places where they met and congregated that he had a real interest and concern in the success of the conspiracy. We find upon all the evidence that there is ample proof of Genovese's participation in the

conspiracy as one of its principal directing heads. That Genovese was called "The Right Man" by those actively dealing with the distribution of the narcotics and that he acknowledged the name is not without significance in view of his interest and participation in furtherance of the conspiracy.

From all that we have thus far said it follows that there was abundant evidence to implicate appellants Vito Genovese, Joseph Di Palermo, Charles Di Palermo, Carmine Polizzano, Ralph Polizzano, Rocco Mazzie, Natale Evola and Jean Capece. The appellants Daniel and Nicholas Lessa, Charles Barcellona and Alfredo Aviles all purchased narcotics for resale from one or more of the central conspirators on numerous occasions. This was enough to make them participants in the conspiracy as it is clear that they knew the nature of the operation. Whether they knew its full extent and all of its activities and actors is immaterial. This leaves for further consideration the sufficiency of the evidence regarding the appellants Santora, Gigante and Rodriquez.

Ralph Santora was sufficiently implicated in the conspiracy by his attendance at several meetings as well as by his use of Cantellops to deliver narcotics to Philadelphia on two occasions, as mentioned above. It was not error for the court to deny the motion of Santora's counsel to strike out Cantellops' testimony about a meeting early in August 1956 in the "Mexican's" hotel room which was attended by Santora, Ormento, Evola, Mazzie, "Mexican" and Cantellops where they discussed a trip to Mexico by Cantellops to bring in narcotics. The trial judge ex-

cluded overt act 15 of the indictment[3] from the jury's consideration, apparently because the proof was at variance as to the location of "Mexican's" hotel. Of course this did not require exclusion of the overt act and we do not understand on what theory the overt act was excluded, but in any event, the exclusion of overt act 15 did not render irrelevant and inadmissible the evidence relating to this meeting since the evidence was relevant to the conspiracy charge.

The court did submit to the jury 17 of the 28 overt acts alleged in the indictment. As there was ample evidence to warrant the jury in finding that one or more of these 17 overt acts was committed in pursuance of the conspiracy nothing turns on any failure of proof regarding overt act 15.

As to Vincent Gigante, we have already referred to his trip to Lorain, Ohio with Cantellops and narcotics for delivery in Cleveland. During the trip Gigante named a number of the alleged conspirators and asked whether Cantellops was acquainted with them. Cantellops complained to Gigante about the risks he was taking in dealing in narcotics. Upon arrival in Lorain, Gigante told Cantellops to get the "stuff" from behind the spare tire and take a bus into Cleveland. The only other evidence relating to Gigante placed him as the driver of the car in which

[3] "15. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, NATALE EVOLA, SALVATORE SANTORA and co-conspirator Robert Roe had a conversation in a hotel on 85th Street, New York City, New York."

Genovese, Ormento, and Cantellops traveled to the meeting mentioned above at which territorial control was discussed. Gigante apparently took no part in the conversation during this drive and he did not enter the house where the meeting was held. Gigante's participation in this second incident appears to be only as a chauffeur. But his trip to Lorain with Cantellops and his knowledge that narcotics were secreted in the trunk are clear evidence of his participation in the conspiracy. His statements during the trip to Lorain would seem to constitute sufficient evidence of his knowledge of the scope of the conspiracy and of the fact that his activity was in furtherance of a larger venture.

As to the defendant Benjamin Rodriquez, we are of the opinion that there is insufficient evidence of his knowing participation in the conspiracy to have warranted submitting the case against him to the jury. Rodriquez strenuously urges that as to him the record contains evidence only of a single isolated purchase of narcotics from Cantellops, and that that evidence, without any additional showing that he knew of the conspiracy of which Cantellops was a member or intended to join in it, is inadequate to convict him. We agree with this contention.

On direct examination, Cantellops testified that in the middle of September, 1955 he delivered narcotics to Rodriquez near the Progresso Bar in the Bronx. Rodriquez pointed out the person to whom Cantellops was to make the delivery and when they walked past each other he delivered the narcotics. When Cantellops gave testimony again about Rodriquez four days later, he testified about

a delivery of drugs to Rodriquez's runner which he places as occurring in the spring of 1956. The only other evidence against Rodriquez was the testimony of a Treasury Agent that, when Rodriquez was arrested in his home on June 4, 1958, he found three cans of milk sugar and upon analysis one of these cans contained some quinine.

Upon cross examination Cantellops affirmed testimony given by him before the grand jury to the effect that he first delivered narcotics to Rodriquez in the spring of 1956. Cantellops' statement on this point was definite and thus it seems to repudiate his prior direct testimony regarding a September, 1955 delivery. Moreover, his testimony contained no clear statement that there was more than a single delivery to Rodriquez, and no suggestion of any conversation with Rodriquez or other manifestation to him by Cantellops which might have given Rodriquez knowledge as to how Cantellops obtained the narcotics.

A single act may be the foundation for drawing the actor within the ambit of a conspiracy. See, e.g., *United States* v. *Carminati*, 247 F. 2d 640 (2 Cir.), cert. denied 355 U. S. 883 (1957). But, since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent. Thus, when two men join together to commit a single robbery, one may infer from their common participation in the robbery that they have conspired to commit the robbery. However, in a multiparty conspiracy of the sort revealed in the present case, with actors performing many different tasks in many

places, the inference does not necessarily follow from one contact with one member of the conspiracy.

Rodriquez was not a regular customer of Cantellops, so far as appears from the evidence. We may assume that Rodriquez knew that the narcotics were illegally imported, but there is insufficient basis in the evidence for assuming that he knew that Cantellops was an agent for an existing conspiracy. So far as appears, Rodriquez had no knowledge whatever as to how Cantellops came into possession of the drugs.

The single purchase alone was not enough to prove that Rodriquez was a participant in the conspiracy. It was necessary to the government's case to submit evidence that Rodriquez knew of the conspiracy and associated himself with it. *United States* v. *Reina*, 242 F. 2d 302 (2d Cir.), cert. denied, 354 U. S. 913 (1957); *United States* v. *Koch*, 113 F. 2d 982 (2d Cir. 1940); *United States* v. *Peoni*, 100 F. 2d 401 (2d Cir. 1938). From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it, but there was no such evidence of knowledge here. Nor was there evidence of a continuous course of dealing between Rodriquez and Cantellops, which might warrant the inference that Rodriquez had some knowledge of the character of the source from which his narcotics came.

We therefore reverse the conviction of Rodriquez and direct the dismissal of the indictment against him.

We now proceed to the consideration of the appellants' numerous claims of error regarding the admission of evi-

dence and the conduct of the trial and rulings of the trial judge.

Cantellops' Prior Perjury and Its Effect on His Trial Testimony

Most of the appellants lay great stress on the character of the witness Cantellops and his admitted perjury before the Grand Jury. They argue that his testimony should have been stricken, that no defendant may be convicted on Cantellops' uncorroborated testimony, and that the indictment should have been dismissed. We do not agree. It was for the jury to judge the witness Cantellops on the basis of all that was brought out about his character, his previous activities, his statements to the government, his testimony before the Grand Jury and before the petit jury.

The jury was fully advised of how Cantellops told his story to government agents and the United States Attorney, of his several appearances before the Grand Jury and the changes and modifications in his testimony there. Cantellops testified for five days on direct examination and for fourteen days on cross-examination. The report of his testimony covers about 2,000 pages of the stenographic minutes. The government made available to defense counsel Cantellops' Grand Jury testimony of 312 pages, two question and answer statements, dated October 10, 1957 and January 16, 1958, records showing Cantellops' visits to the United States Court House, the Veterans Administration's medical records regarding Cantellops, and

Rikers Island medical records when the witness was there incarcerated in 1950 and 1953.

The fact that a witness testified untruthfully at a prior time does not require a finding that he is testifying perjuriously at trial. *United States* v. *Margolis*, 138 F. 2d 1002, 1004 (3 Cir. 1943). It is for the jury to say whether his testimony at trial is truthful, in whole or in part, in the light of the witness' demeanor, his explanations and all the evidence in the case. *United States* v. *Reina*, 242 F. 2d 302, 307 (2 Cir.), *cert. denied* 354 U. S. 913 (1957); *United States* v. *Lennon*, 246 F. 2d 24, 28 (2 Cir.), *cert. denied* 355 U. S. 836 (1957).

Nor is there any merit in the contention that Cantellops' admissions that some of his testimony before the grand jury was untruthful vitiated the indictment. The Supreme Court has held that an indictment is not subject to challenge by reason of the incompetence of evidence presented to the Grand Jury. "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." See *Costello* v. *United States*, 350 U. S. 359, 363 (1956).

The further claim is made that the convictions should be reversed because it now appears that Cantellops testified falsely at the trial that no promises had been made to him in return for his testimony. In this connection, affidavits have been filed on this appeal pointing out that on July 1, 1959, three months after the conviction in this case, the Governor of New York commuted Cantellops'

sentence for possession of narcotics. This commutation was granted at the request of the United States Attorney because of Cantellops' assistance to the government in narcotics prosecutions. It does not follow from the action of the United States Attorney and the action of the Governor that any promise was made to the witness. It is a well understood practice for the prosecutor and the chief executive concerned to give appropriate consideration to witnesses who have assisted the government. The witnesses concerned are aware that this is so; the jurors and the general public are also aware of this practice. The purpose of the government is to encourage witnesses to tell what they know; that may be accomplished without prior promise in a particular case. Consequently we do not conclude from the fact of the Governor's commutation that Cantellops was testifying falsely when he disclaimed any promise. Surely it could have been no surprise to anyone that the witness was later shown some consideration; the jury knew that Cantellops hoped for such a result and that the jury gave this due weight can hardly be doubted in the light of the cross-examination on this subject and the arguments made by defense counsel in their summations.

The Interruption of Cantellops' Cross-Examination

The appellants complain that the trial judge erroneously interfered with their cross-examination of Cantellops because the judge permitted the witness to speak to his young daughter at the end of one day and to speak to court-assigned counsel during recess on the following day. These

rulings were well within the proper discretion of the trial judge. There was no showing that these talks had to do with the substance of the witness' testimony and the argument that they unduly interfered with the right to cross-examine, or were in any way prejudicial, has no substance whatever.

On February 10, in the midst of a four weeks cross-examination which began January 30, Cantellops was shown a letter he had written his daughter in which he said he "intended" to be released from prison around Christmas 1958. Later that day the court was informed that Cantellops, fearing for his daughter's safety, wished to see her. Cantellops thereafter talked to his daughter on the telephone although he did not see her. Certainly, under these circumstances and in light of the exceptional length of cross-examination, it was well within the trial court's discretion to release Cantellops from sequestration to speak with his daughter. See *Kaufman* v. *United States*, 163 F. 2d 404, 408 (6 Cir. 1947).

The next day, following assertion by Cantellops that h was worried about his constitutional rights, the judge assigned Arnold Fraiman, Esq. as counsel and Cantellops conferred with him during recess the following day and advised him to answer certain questions which had been asked him. This course of procedure was entirely proper. No delay was involved, and the witness in fact answered all the questions asked him. The complaint of undue interference with cross-examination is frivolous. Indeed the court was exceedingly generous in the latitude it gave counsel in cross-examining Cantellops, even to the point of

permitting considerable repetition and minute inquiry into many matters of doubtful relevance.

The Testimony of Ralph Polizzano's Admissions

Ralph Polizzano complains that the court should have granted him a mistrial because of the introduction of the testimony of James H. Gibbon, of the New York City Police Narcotics Squad, regarding admissions made by Polizzano to Gibbon. After hearing evidence, not in the jury's presence, the court rejected the claim that the admissions had been coerced.

Gibbon testified that after he arrested Ralph Polizzano on July 6, 1957, he went with Polizzano to his apartment #2 on the ground floor of 36 East 4th Street and that the latter told him the "junk" was on top of the cabinet in a black zipper case, and that the cutting apparatus and scales were in another room.

Salvatore Marino then testified to making a delivery of narcotics from the apartment at 36 East 4th Street for Ralph Polizzano before his arrest the night of July 5. On cross-examination Marino claimed that in the police station he was punched in the stomach by the arresting officer and two other officers for five or ten minutes and was knocked out. He claimed he saw two or three other officers strike Ralph Polizzano in the stomach.

Not until this point in the trial did counsel for Ralph Polizzano move to exclude Gibbon's testimony of the oral admissions on the ground they were made under duress.

Counsel asked for a hearing and for a mistrial if the court should find for Ralph Polizzano on these questions.

The trial judge could have denied the motions on the ground that they were untimely made. As it was, he granted a hearing at which Polizzano testified. From the discrepancies in the testimony of Marino and Polizzano, Polizzano's failure to complain earlier, his plea of guilty to a state narcotics charge based on the same facts, and the police medical records, there was ample reason for the judge to deny the motions as he did. Nevertheless he charged the jury that they were to disregard the admissions if they found them to have been made for fear of bodily harm, and that, in any event, they were to be considered solely against Ralph Polizzano. We find no error in these rulings.

Aviles' Postarrest Statement Regarding Ralph Polizzano

Ralph Polizzano also complains of the admission in evidence, over his objection, of an unsigned statement of appellant Aviles made after the latter's arrest on June 3, 1958. In this statement Aviles referred to a meeting with "Ralph" at the Squeeze-Inn Bar, related that Ralph wanted him to buy stuff directly from him instead of the Spanish fellow who had introduced him and stated that the stuff he bought from Ralph was delivered by a man he called "Junior." When the judge overruled the objection to admission of the exhibit, Ralph Polizzano's counsel sought to have the name "Ralph" deleted or to have "a man" substituted, but this application was also denied. The judge

did instruct the jury three times immediately preceding and following admission of the statement that it was to be considered only against Aviles and repeated this admonition twice in instructing the jury. We find no error in the admission of the statement in evidence in view of the judge's careful and repeated instructions.

The government may introduce admissions of one defendant even though other defendants on trial are implicated, provided the jury is carefully and clearly instructed that the admission can be considered only against the declarant. *Delli Paoli* v. *United States*, 352 U. S. 232 (1957); *United States* v. *Bando*, 244 F. 2d 833, 838-9 (2 Cir.), *cert. denied* 355 U. S. 844 (1957). While it might have been the better practice under these circumstances to have deleted the name "Ralph" from the statement before admitting it in evidence, so as not to run the risk of unnecessarily focusing attention on Polizzano, we see no reason to presume that the jury disregarded the judge's repeated instructions as to the use to be made of the admissions.[4]

Barcellona's Right to Counsel

Appellant Barcellona complains that he was denied counsel in violation of his right under the Sixth Amendment which guarantees that "In all criminal prosecutions, the accused * * * shall enjoy the right to have the assistance of counsel for his defence," and under Rule 44, Federal Rules of Criminal Procedure. We think appellant was

[4] We do not overlook the fact that when the jury asked for the Aviles statement during its deliberations the trial judge directed the deletion of "Ralph" before sending the exhibit to the jury.

adequately represented. It is true that Barcellona was without counsel from the time he appeared in the district court on July 16, 1958 until November 25, 1958, when the court assigned Roy Reardon, Esq. to represent him. But the trial did not commence until January 5, 1959 and thus his counsel had six weeks in which to prepare. This was ample assistance of counsel in view of the fact that Barcellona does not advise us in what respect he was prejudiced by his lack of counsel prior to November 25, 1959. Furthermore, he was given the benefit of all motions made by other counsel during pre-trial. So far as appears, all was done that needed to be done and could be done on his behalf. While there is language in the cases that an accused is entitled to counsel "for any part of the pretrial proceedings" this is always coupled with the qualification that there is no error unless "he is so prejudiced [by the absence of counsel] as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'" *Crooker* v. *California*, 357 U. S. 433, 439 (1958).

Defendant Fiano's Courtroom Outburst

On March 11, when the government was adducing evidence as to defendant Fiano's birthday, Fiano burst into a tirade before the jury in which he asserted that all those on trial were convicts and that some were then serving time in prison. All defense counsel immediately moved for a mistrial. In the course of these motions counsel for Jean Capece asserted that this defendant had no criminal record, which led to further motions for a mistrial. The appellants

claim that the Fiano outburst was provoked by the government, but there is no warrant for this assertion. In the context of the questioning then in progress, Fiano's birthday was a relevant line of inquiry. Following the outburst, Judge Bicks promptly instructed the jury to disregard Fiano's statements, and also told the jury that they were not to assume from the remarks of Capece's counsel that any other defendants had a criminal record. Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper. See, e.g. *United States* v. *Stromberg*, 268 F. 2d 256, 269 (2 Cir. 1959); *Reistroffer* v. *United States*, 258 F. 2d 379, 392-93 (8 Cir. 1958), *cert. denied* 358 U. S. 927 (1959).

Double Jeopardy Claims of Daniel and Nicholas Lessa and Joseph Di Palermo

Appellants Daniel and Nicholas Lessa claim that the trial court should have granted their motions for acquittal on the ground that they were twice placed in jeopardy because they had already been convicted for the same acts in *United States* v. *Stromberg*, 268 F. 2d 256 (2 Cir. 1959). In that case the evidence showed that the Lessas received their supply from Vellucci, through runners Ewing and Tedesco, until Vellucci was arrested in November 1955.

It was only after that that they turned to the defendant Orniento for their supply. Thus the Lessas, as dealers, simply purchased their narcotics supplies from two different and separate groups. The mere fact that several retailers purchase from separate suppliers at different times does not transform two separate conspiracies into one.

Analysis of the *Stromberg* record and comparison with the proof in this case shows that the two conspiracies were entirely different enterprises in all respects, their principals, the source of their drugs, the means and places of importation, their distribution points, and the centers from which they operated in Manhattan.

Joseph Di Palermo, also indicted in the *Stromberg* conspiracy, likewise claims double jeopardy. As he was not placed on trial in Stromberg since he was then a fugitive, he has obviously not twice been placed in jeopardy.[5]

The Simultaneous Trial of 17 Defendants

The complaint that the individual defendants could not receive sufficient individual consideration at a trial of 17 defendants is without basis in fact or law. The question of how many co-defendants should be tried at one trial is within the discretion of the trial court and there is no support for the claim that that discretion was abused here.

[5] The *Stromberg* proof showed that Joseph Di Palermo's only link with the conspiracy was Vellucci from whom he purchased heroin; he had no contacts with any of the principal *Stromberg* conspirators and he never had any contact with the Lessas so far as the proof in that case showed.

The rights of each defendant were scrupulously guarded by the trial judge throughout the trial. In the number of extra challenges allowed in the jury selection, the latitude of cross-examination, the one week allowed for defense summations, and the patience show in listening to numerous motions of the many counsel, the trial judge was eminently fair to the point of being overgenerous. Moreover, the court's charge to the jury fairly summarized the evidence, distinguished the case of each defendant and emphasized the requirement of separate consideration of the case as to each defendant. Under these circumstances, there can be no complaint of prejudice from such a joint trial. See *United States* v. *Stromberg*, 268 F. 2d 256, 265 (2 Cir. 1959); *United States* v. *Bruno*, 105 F. 2d 921 (2 Cir.), rev'd on other grounds, 308 U. S. 287 (1939).

Appellant Genovese complains he was so prejudiced by testimony that he was seen emerging from an automobile on January 17, 1956 at Kenmare and Mulberry Streets in Manhattan as to have necessitated the granting of a mistrial as to him. This testimony was given by Sherman Willse, a member of the staff of the Senate Select Committee on Improper Activities, who in January 1956 was a New York City police officer. This testimony was stricken by the court[6] with clear instructions to the jury to disregard it, although the government stated that it was prepared to show that the automobile was at the time registered in the name of appellant Vincent Gigante.

[6] In our opinion the court erred in excluding the evidence which corroborated Cantellop's testimony of the relationship between Genovese and Gigante as it tended to show that Genovese was driven around by Gigante and it was near enough in time to the events in question.

We cannot see how Genovese was improperly prejudiced by this testimony. We have read it over and conclude that it was utterly meaningless by itself and devoid of the sinister import which appellants seek to attach to it. In any event the striking of the testimony and the court's instruction to the jury cured any possible error in admitting it. Our jury system is founded on the assumption that the jury will adhere to the trial court's instructions to it. See *United States* v. *On Lee*, 193 F. 2d 306 (2 Cir. 1951), aff'd 343 U. S. 747 (1952). Under the circumstances here present, there is no reason to presume that the jury disregarded the court's instruction.

Appellant Jean Capece complains of the admission of testimony of a customs official that she flew to Cuba on November 20, 1956 with Joseph Di Palermo and Salvatore Benanti and upon her return two days later she had $9,000 in cash concealed in her brassiere. Coming after much evidence showing that Jean Capece worked with Joseph Di Palermo in the distribution of narcotics, that Benanti was a runner for Di Palermo, and that two months earlier, in September 1956, Montanez had advised Di Palermo that no narcotics would be available from Cuba for some time because of the revolution, this testimony was relevant to corroborate Cantellop's story. Moreover, Benanti's use of a false name and address and Jean Capece's three different versions of how she came to possess $9,000 in one hundred dollar bills would hardly support the theory that the two day trip by air was for a vacation. On the contrary, the trip was persuasive independent evidence corroborating Cantellop's testimony, as it was reasonable to conclude that

the three had gone to Cuba to purchase narcotics, although apparently with some lack of success.

We have dealt with the major claims of error advanced by the appellants. The other contentions have so little merit that they do not warrant any discussion. In our opinion Genovese's motions to inspect a statement taken by the United States Attorney from Customs Agent Benjamin Begendorf, for two reports of Narcotic Agent John Enright, and to take depositions of Begendorf and Enright were without the slightest foundation. Neither was called as a government witness and both were available to be called by the defense, who failed to call either. These motions seem to have had no purpose but to delay the trial. The trial judge exhibited commendable patience and courtesy in the face of such maneuvers.

On this appeal two of the defendants have been represented by assigned counsel, Roy L. Reardon for Charles Barcellona and Allen Stim for Ralph Polizzano. These counsel represented the same defendants at trial; in addition Martin Carmichael, Jr. represented Louis Fiano at trial. We commend them for their services so rendered and the high quality of their counsel.

With the exception of Rodriquez, the appellants have all been convicted after an eminently fair trial upon the convincing evidence of several accomplices which evidence was corroborated in important details.

We affirm the judgments of conviction of all appellants, except Benjamin Rodriquez and we reverse his conviction and direct that the indictment be dismissed as to him.

FILE COPY

Nos. 735, 763, 772, 807, 812, 817, 750 Misc.,
792 Misc., 793 Misc., 840 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1959

Office-Supreme Court, U.S.
FILED
APR 26 1960
JAMES R. BROWNING, Clerk

NATALIE EVOLA AND VINCENT GIGANTE, PETITIONERS
v.
UNITED STATES OF AMERICA

SALVATORE SANTORA, PETITIONER
v.
UNITED STATES OF AMERICA

DANIEL LERNA AND NICHOLAS LERNA, PETITIONERS
v.
UNITED STATES OF AMERICA

JEAN CAPECE, PETITIONER
v.
UNITED STATES OF AMERICA

JOSEPH DI PALERMO, PETITIONER
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VITO GENOVESE, PETITIONER
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RALPH POLIZZANO, PETITIONER
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CARMINE A. POLIZZANO, PETITIONER
v.
UNITED STATES OF AMERICA

CHARLES BARCELLONA, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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v.

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 274 F. 2d 179.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1960. Petitions for rehearing by a number of petitioners were denied on January 26, 27 and 29, 1960. As to some, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Harlan to March 11, 1960, and as to others, until March 26, 1960. All petitions were filed within 30 days after denial of rehearing or within

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[1] The record consists of ten volumes. Volume I constitutes the pretrial proceedings in the district court and will be referred to as "Vol. I". The other nine volumes, which are consecutively paginated, constitute the transcript of proceedings in the district court and will be referred to as "Tr.". In addition, we have lodged with the Clerk of this Court petitioner Genovese's appendix in the court of appeals, which will be referred to as "App."; the grand jury minutes of the chief government witness, which will be referred to as "G.J."; and the four appendices of the appellants in *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863, which will be referred to as "Stromberg App.".

the time as extended. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to sustain the convictions.

2. Whether the court erred in various rulings on evidence.

3. Whether the reduction of the state prison sentence of the chief government witness by the Governor of New York, following the conviction of the petitioners, proves that the witness lied in testifying that no promises were made to him and that the closing argument of the government that no promises were made to the witness was improper.

4. Whether adverse newspaper publicity deprived petitioners (Genovese, No. 817, and the Polizzanos, No. 792 Misc. and No. 793 Misc.) of a fair trial.

5. Whether Petitioner Barcellona (No. 840 Misc.) was deprived of the assistance of counsel.

6. Whether alleged newly discovered evidence entitles petitioner Genovese (No. 817) to relief in this Court.

STATEMENT

A one-count indictment returned in the district court for the Southern District of New York charged the petitioners, together with 25 other defendants and 14 persons named as co-conspirators but not as defendants, with having conspired, from about February 1, 1955, to July 7, 1958, to import, conceal, possess, transport, dilute, purchase, sell and distribute narcotic drugs, in violation of 21 U.S.C.

173 and 174. Twenty-eight overt acts were alleged (App. 53–58a). Petitioners and five others stood trial on January 5, 1959. Following a trial by jury, petitioners and three others were convicted and sentenced to serve varying terms of imprisonment ranging from 5 to 20 years.[2] On appeal, the court of appeals affirmed the judgments as to the petitioners and two others.

The pertinent facts may be summarized as follows:

1. *The evidence.*

a. In early March 1955, in New York City, Nelson Cantellops, the chief government witness,[3] in

[2] Charles Barcellona and Jean Capece received 5-year sentences, the sentence of Barcellona to run consecutively to a New York sentence of from four to five years; Vincent Gigante and Ralph Polizzano received 7 years, the sentence of Ralph Polizzano to run consecutively to a New York sentence of from two years and six months to four years; Carmine Polizzano received 8 years; Alfredo Aviles, Benjamin Rodriquez and Natale Evola received 10 years; Charles Di Palermo, Rocco Mazzie and Nicholas Lessa received 12 years, the sentence of Nicholas Lessa to run concurrently with a prior federal sentence of four years; Daniel Lessa received 14 years, the sentence to run concurrently with a prior federal sentence of five years; Joseph Di Palermo and Vito Genovese received 15 years; and Salvatore Santora received 20 years as a multiple offender under the Narcotics Control Act of 1956. In addition, fines of $20,000 each were levied on Joseph Di Palermo, Natale Evola and Vito Genovese (Tr. 7431–7459).

[3] Four accomplices, Nelson Cantellops, Peter Contes ("Pete the Greek"), Joseph Basile and Salvatore Marino ("Junior"), testified for the government. In testifying, several of the accomplices referred to some of the petitioners with aliases, as follows: Vito Genovese ("The Right Man"); Joseph Di Palermo ("Joe Beck"); Charles Di Palermo ("Charley Brody"); Vincent Gigante ("Chin"); Natale Evola ("Joe Diamond"); Salvatore Santora ("Tom Mix").

seeking financial backing for an electronics device for cheating at a Spanish card game, was referred by a friend to Charles Barcellona (Tr. 979–980). Barcellona loaned $500 to Cantellops (Tr. 983–984). When Cantellops was unable to repay the loan, Barcellona told him that he could do so by delivering "junk" (*i.e.*, narcotics) to the West Coast (Tr. 987). Cantellops agreed to make the trip and was given instructions by Barcellona and Joseph Di Palermo in the presence of the Polizzano brothers (Tr. 989–990). Joseph Di Palermo told Cantellops that the trip would put him in the "big money" and that he "would have a good future in the junk busi[redacted] due to the development of the Spanish market [redacted] New York (Tr. 993–994).

Cantellops carried a package wrapped as a gift to Las Vegas, and at the direction of Carmine Polizzano, who met him there, delivered it to Fiano (Tr. 1025–1028). In New York, Carmine Polizzano told Cantellops that "Joe Beck [Joseph Di Palermo] was very pleased with the trip" and that he should see Barcellona "for the payoff" (Tr. 1031). On the following day, Barcellona paid Cantellops for the trip and indicated that he could supply Cantellops with "junk" if he "wanted to push it" (Tr. 1032). During April and May 1955, Cantellops engaged in the narcotics traffic, ordering narcotics from Barcellona (Tr. 1034–1037).

In June 1955, Carmine Polizzano and Joseph Di Palermo persuaded Cantellops to make a trip to Florida to pick up "stuff" (Tr. 1037–1047). He was paid $600 by Di Palermo, and a "tip" of an ounce of heroin, which was promised him by Carmine Poliz-

zano, was subsequently delivered to him by Russo (Tr. 1051–1055). Cantellops also made trips for Joseph Di Palermo and Carmine Polizzano to Chicago (Tr. 1056–1078) and Miami (Tr. 1100–1127), and made deliveries in New York for Ralph Polizzano (Tr. 1084–1086, 1116–1118). On his second trip to Florida he met Charles Di Palermo who introduced him to a man named "Cuba" (Tr. 1104–1106).

Early in 1956, Cantellops was assigned by Joseph Di Palermo to watch one Gonzalez ("Guayamita") who dealt with a runner named Colletti (Tr. 1159–1161).[4] After Gonzalez was arrested, Cantellops took over his territory, getting his supplies from Ralph Polizzano (Tr. 1172–1176).

b. From early 1956 until November 10, 1956, when he was arrested, Joseph Basile, who testified for the government, purchased large quantities of heroin and cocaine from Joseph Di Palermo for resale purposes, chiefly in Schenectady, New York (Tr. 3913–3916, 3921–3922, 3925–3926, 3929, 3935–3943, 3955, 3958). Basile came to New York City and followed the procedure outlined by Joseph Di Palermo of first calling Jean Capece at a "Walker 5" number, where he either spoke to Joseph Di Palermo or had Capece relay a message for an appointment (Tr. 3938, 3944–3945, 3952, 3955–3957). (Capece had the unpub-

[4] On August 15, 1956, Colletti agreed to sell a "quarter kilo" of heroin to a narcotics agent for $3,000, with delivery to be made at a nearby movie theatre (Tr. 584–589). On leaving the agent, Colletti went directly to a bar and spoke with Ralph Polizzano and Russo (Tr. 504–507, 644). Subsequently, Colletti and Russo were arrested at the delivery site (Tr. 546–547, 589–590). When Ralph Polizzano, who was watching, saw that Colletti and Russo were in custody, he "turned around and hurried" away (Tr. 507).

lished telephone number, Walker 5-8217 (Tr. 4589, 5121, 5123-5125)). Either Joseph Di Palermo or his runners delivered the narcotics to Basile (Tr. 3935-3936, 3941-3942, 3958). Throughout 1956, Capece participated in conversations with Joseph Di Palermo and Basile regarding narcotics (Tr. 3939-3942, 3947-3949, 3956-3957). On one occasion, Capece handed narcotics to Basile at Joseph Di Palermo's direction, and on another occasion, Charles Di Palermo delivered narcotics to Basile (Tr. 3948-3949, 3952-3954). Basile paid Joseph Di Palermo either personally or by wire for the narcotics.[5] On one occasion, acting on instructions from Joseph Di Palermo, he wired $1,000 to Capece (Tr. 3922, 3924, 3957-3961).

c. In the fall of 1955, Carmine Polizzano instructed Cantellops to inquire into "policy banks" in the lower east side in Manhattan, because some "big people" needed this information in order to "seal certain territory" (Tr. 1127-1129, 1145-1146).[6] Later, he instructed Cantellops to investigate the Puerto Rican "facilities" for importing "junk" into the United States. In November 1955, Cantellops went to Ralph Polizzano's apartment and participated in a meeting

[5] Basile testified that he had seen Joseph Di Palermo and John Ormento together, and that on one occasion in early 1956 when he (Basile) gave Di Palermo a "good report on the goods" and ordered another "half-kilo" of heroin, Joseph Di Palermo said, "Yes, this [*sic*] goods will be the same. It is Big John's [Ormento's] goods and it is very good" (Tr. 3926-3929). He also testified that "goods" referred to "drugs, heroin or cocaine" (Tr. 3913).

[6] Cantellops testified that territory is "sealed" when policy numbers are operated as a front for the narcotics traffic (Tr. 1128-1129, 1146-1147, 1383).

attended by Ralph Polizzano, Joseph Di Palermo, Russo, John Ormento ("Big John") and Benjamin Levine ("Mr. Benny") (Tr.1133–1138).[7] Ralph Polizzano said that he wanted to open up additional narcotics plants due to the growing Spanish market, and that the territory would have to be "sealed" (Tr. 1143). All agreed that they would go along with the plans provided "The Right Man" (Genovese) approved (Tr. 1147–1149). When the conversation shifted to the importation of narcotics, Cantellops pointed out that narcotics could be brought into Puerto Rico through the nearby island of Vieques, and that "from the mainland (Puerto Rico) then through different means it could be brought to the United States" (Tr. 1150–1151). The group said that Cantellops would be contacted if Vieques could be used. Later, Ormento and Joseph Di Palermo stated that "because of the revolution in Cuba it was quite difficult to bring narcotics to the United States through the coast" (Tr. 1152). They said that the ships "Marquess De Comilla" and "Salamanca" carried narcotics but were searched, that "a quarter million cargo" had to be dumped in the Havana Harbor, and that an airplane had been purchased but that it was "unreliable for steady supplies" (Tr. 1152–1153). Later, when Cantellops asked for instructions in case of a "fall", Ormento said that he should "put up any story until

[7] Although Carmine Polizzano told Cantellops to attend the meeting, Carmine Polizzano did not attend himself. He was in the apartment with Cantellops, Russo and Ralph Polizzano, but left before Levine, Ormento and Joseph Di Palermo arrived (Tr. 1134).

we reach you with legal aid or money". Levine stated "that the boys always keep their word", and that they could be trusted (Tr. 1155–1156).

d. In July 1956, at the suggestion of Carmine Polizzano, Cantellops agreed to deliver narcotics in Cleveland for Ormento (Tr. 1183–1185). Carmine Polizzano told Cantellops that it was a small, but important, delivery, and that it would help Cantellops in the organization (Tr. 1184). On the following day, as Carmine Polizzano was instructing Cantellops, Vincent Gigante ("Chin") drove up, and was introduced as the man who would drive (Tr. 1188). While enroute to Cleveland, Gigante inquired whether Cantellops knew "Big John" (Ormento), "Joe Beck" (Joseph Di Palermo), "The Right Man" (Genovese); "Tom Meeks [Mix]" (Santora) and others (Tr. 1210). Cantellops told Gigante that he "saw no reason [for] taking chances in dope" when his gambling device, which he explained in detail, "could provide a big amount of income" (Tr. 1210). Later, Gigante said he would contact "Big John" to arrange for Cantellops to meet "The Right Man" for the purpose of looking into the gambling device (Tr. 1210–1211). At Lorain, Ohio, on instructions from Gigante, Cantellops opened the trunk and removed a package of "stuff" from behind the spare tire of the car (Tr. 1211). Cantellops then caught a bus to Cleveland where he met Charles Di Palermo, and the two men made the narcotics delivery to a woman there (Tr. 1213–1215). Cantellops then returned to New York where, at a meeting arranged by Carmine Polizzano, Ormento introduced Cantellops to Mazzie, and in

Mazzie's presence, complimented and paid Cantellops for the Cleveland trip (Tr. 1216).

In early August 1956, as arranged by Carmine Polizzano, Cantellops met Ormento and a Mexican ("Mexico") concerning a pickup of narcotics near the Mexican border (Tr. 1217–1219). Owing to his distrust of the Mexicans, Cantellops turned down the proposition (Tr. 1222–1224). On the following night, Ormento, Mazzie, "Mexico" and Natale Evola ("Joe Diamond") met Cantellops and drove to a restaurant on East 86th Street. While Cantellops was at the restaurant counter, Ormento approached a table and spoke to Genovese (Tr. 1226–1227). Shortly thereafter, Ormento returned and said to Cantellops, "Let's go, the right man wants to take a look at you to see if you are allright" (Tr. 1227).[8] Cantellops, Ormento, Mazzie, Evola and "Mexico" left the restaurant and went to "Mexico's" hotel room where they subsequently met Salvatore Santora ("Tom Mix") (Tr. 1228–1229). The proposed Mexican trip was again discussed. The group finally agreed to Cantellops' suggestion that he should pick up the narcotics in Florida (Tr. 1230–1231). A few days later, in Florida, "Mexico" picked up a suitcase and handed it to Cantellops (Tr. 1233–1234), who delivered it in New York, as arranged, to an unidentified man. At a meeting subsequently arranged by Carmine Polizzano,

[8] On two occasions in the late spring or early summer of 1956, Cantellops saw Carmine Polizzano talking to Vito Genovese, who was not known to Cantellops at that time. On one of these occasions, Carmine Polizzano told Cantellops "never to interfere when he was talking to the right man" (Tr. 1298).

Ormento made part payment to Cantellops (Tr. 1237–1238). The balance of the $950 payment was later paid to Cantellops by Ormento.

Shortly thereafter, Cantellops delivered three to four pounds of narcotics for Ormento to an unidentified courier in Philadelphia (Tr. 1240–1244). Later, Ormento asked Cantellops, in the presence of Santora and Mazzie, if he would make a "trip" for Santora (Tr. 1247–1248, 3567, 3570). On the following day, Santora said that the trip was ready and instructed Cantellops (Tr. 1248–1250, 3575–3576, 3583–3584). Following the delivery of the narcotics in Philadelphia, Cantellops returned to New York where he later met Ormento, Mazzie, Santora and Evola, and was paid by Ormento with money from Santora (Tr. 1251–1252, 3570–3572).

Cantellops, acting on instructions from Ormento, delivered narcotics in the Bronx to an unidentified man for Daniel and Nicholas Lessa, as the Lessa brothers watched nearby (Tr. 1276–1282). Toward the end of August, Cantellops, acting on instructions from Ormento, made another narcotics delivery to an unidentified man for the Lessa brothers, who, along with Mazzie, were near the delivery site (Tr. 1282–1286, 1288–1289). Cantellops was later paid by Ormento.

Peter Contes testified to purchasing narcotics from in Lessas in 1956 (Tr. 3755–3775). Ormento and Mazzie encouraged Daniel Lessa to deal with Contes (Tr. 3756–3760).

d. In late August or early September 1956, Cantellops met Ormento, Evola, and two others, and the group drove to a German restaurant (Tr. 1291–1292). Or-

mento went inside to make a telephone call, returned to the car, and said, "We can go; they are behind us" (Tr. 1292–1293). The group then drove to a turnoff on the West Side Highway, where a second car subsequently pulled up. Ormento and Cantellops left their car and entered the second car which was driven by Gigante for Genovese (Tr. 1293–1295, 1301). In introducing Cantellops, Ormento said to Genovese, "This man is doing a good job for us. He is helping us and doing a good job for us" (Tr. 1296). Ormento referred to Genovese as "the right man" (Tr. 1296). Genovese told Cantellops that they "were going to a meeting where territorial control was to be discussed," that people were counting on Cantellops' assistance, and that Cantellops, by helping them out, could earn enough money to cover the cost of a sample gambling device (Tr. 1297) (Cantellops had explained his gambling scheme to Genovese earlier in the evening). At about 11 p.m., the two automobiles arrived at Mazzie's home in the Bronx. All but Gigante and Genovese entered the premises. The group discussed "sealing off" the Longwood area in the East Bronx by the use of policy banks, a plan to facilitate the distribution of narcotics to the Spanish market (Tr. 1303–1306, 1308, 1312–1314). Ormento said that "numbers" was not a problem, that the big problem was "too many pushers" (Tr. 1307).

Toward the close of this conversation, which lasted 20 or 30 minutes, Genovese entered the room and inquired of their decision (Tr. 1315). Genovese said that he needed this information "because he wanted

to know when to send his men in" (Tr. 1315). At this point, everyone engaged in conversations regarding the time and details of the plan. At the close of the meeting, Genovese and Gigante drove off in one car, and the rest of the men drove off in another car. Ormento instructed Cantellops to check the operations of the pushers and make a determination as to what could be done to get rid of them (Tr. 1317). In the presence of Evola, Ormento told Cantellops that he (Cantellops) would be the distributor and "contact man" for the new territory (Tr. 1316–1317).

e. In early September 1956, Cantellops, acting on instructions from Ormento and Galante, flew to Puerto Rico and contacted one "Laurensano" in an effort to pick up narcotics (Tr. 1321–1323, 1325–1326). Cantellops went to the island of Vieques, off Puerto Rico, and picked up eight to nine pounds of heroin. He returned to Puerto Rico and, after notifying "Laurensano," mailed the narcotics in three packages to fictitious persons in care of general delivery in New York (Tr. 1331–1334). On his return to New York, Cantellops was paid by Ormento, although Ormento was "quite upset" over Cantellops' use of the mails (Tr. 1335–1336)

Shortly thereafter, as arranged by Carmine Polizzano, Cantellops met Joseph Di Palermo, "Cuba" and "Montanez" in a Spanish nightclub. Montanez told Joseph Di Palermo not to expect any more deliveries through Key West and Miami for the rest of the year (due to the Cuban revolution), and that "they could not supply steady" with planes (Tr. 1339–1340). A

few days later, Cantellops was arrested and imprisoned until February 1957 (Tr. 1337, 1340–1341).

In mid-November 1956, Joseph Di Palermo, Capece and a third party traveled to Havana, Cuba. The trio returned to New York on November 20, where, in passing through the United States Customs at Idlewild Airport, a customs inspectress found $9,000 in new, consecutively-numbered $100 bills in an undergarment of Capece (Tr. 4579–4581, 4591). At first, Capece said that the money represented her life's savings, then that it was won at gambling, and later that it was a loan from a person whose name she would not divulge (Tr. 4579–4582, 4591–4592).

f. Shortly after his release from prison in February 1957, Cantellops contacted Ralph Polizzano who, unaware of the fact that Cantellops had been imprisoned, said that Cantellops could get narcotics from him (Tr. 1341–1342). Cantellops obtained Alfredo Aviles as a narcotics customer and made one to two narcotics deliveries a week to Aviles for Ralph Polizzano (Tr. 1355–1356). On one occasion, when Joseph Di Palermo was present, Cantellops saw Ralph Polizzano hand Capece the proceeds from a narcotics transaction with Aviles (Tr. 1361–1364). About the beginning of April 1957, Cantellops introduced Aviles to Ralph Polizzano, and Aviles began to purchase narcotics directly from Ralph Polizzano. (Tr. 1357–1359). In May, Ralph Polizzano delivered narcotics to Aviles at a nearby bar. Later he had Marino make delivery (Tr. 289–296).

g. In late April 1957, on instructions from Joseph Di Palermo and Carmine Polizzano, Cantellops trav-

eled to Miami, Florida, where he met Charles Di Palermo and "Cuba," and the trio picked up narcotics in Key West (Tr. 1364–1366, 1369–1370). A little later, Charles Di Palermo gave Cantellops additional narcotics for return to New York (Tr. 1372–1375). On his return to New York, Cantellops delivered the narcotics to Carmine Polizzano, and later, Joseph Di Palermo paid Cantellops in the presence of Carmine Polizzano (Tr. 1376–1377). Shortly thereafter, Ralph Polizzano had Marino give Cantellops a "tip" of an ounce of heroin, which Carmine Polizzano had promised Cantellops earlier (Tr. 1377–1378).

h. In early June 1957, Joseph Di Palermo, at a meeting with Cantellops and the Polizzano brothers, said that "things were not healthy" and that "he would have to take a vacation" (Tr. 1385–1386). He told Cantellops that Charles Di Palermo would take over, and that Cantellops could continue to "do business" with the Polizzano brothers (Tr. 1386). Throughout June, Cantellops made narcotics deliveries for Carmine Polizzano and was paid by Ralph Polizzano (Tr. 1386–1388).

Cantellops was arrested on July 1, 1957, and a few days later, Ralph Polizzano and Marino were arrested following a local delivery of narcotics. Ralph Polizzano, in response to an inquiry as to the location of the "junk," pointed out that "[i]t's in a black zipper case; it's up on top" (Tr. 106). This case contained two containers of "white powder" which, on later analysis, was found to be heroin and cocaine (Tr. 490–492).

2. *The examination of Cantellops*

a. Cantellops was under cross-examination from January 30, 1959, to February 25, 1959. On February 10, Cantellops identified a letter which he had written to his daughter in which he apparently wrote that he expected to be released around Christmas 1958 (Tr. 2512–2515). Following the court's refusal to hear a "constitutional request" from Cantellops (concerning the manner counsel obtained the letter) (Tr. 2514–2516), the cross-examination continued, during which Cantellops denied that he had been promised he would be released from prison by Christmas of 1958 (Tr. 2515.)

After the noon recess, the government moved to remand Daniel Lessa for threatening a federal agent (Tr. 2518–2519), and to suppress the letter as possibly obtained in violation of law (Tr. 2524). Without objection, the jury was excused for the afternoon (Tr. 2544–2546).

At the conclusion of the argument on the motions, the United States Attorney informed the court that Cantellops had told the United States Marshal that he was concerned with the safety of his daughter and "would not testify further unless he saw his daughter" (Tr. 2559). The United States Attorney suggested that "in view of the recess this afternoon * * * it might be appropriate if the witness were permitted to see his daughter" (Tr. 2559). Over the objections of counsel for Evola and Gigante, the court permitted Cantellops to visit with his daughter (Tr. 2559–2571).

At the opening of court on the following day, February 11, 1959, the court stated that it had been informed that Cantellops wished to speak to the court. The court reported that it had refused to speak with the witness except in the presence of all counsel and that "in view of his claim of privilege yesterday or assertion of constitutional rights" it would assign counsel to the witness (Tr. 2574–2575). On short notice, the court obtained the services of Arnold Fraiman, Esq., with whom the witness could discuss his claim of constitutional right or privilege in order "to protect his individual rights, maybe against the Government" (Tr. 2582–2583). Cantellops accepted the appointment of counsel but did not avail himself of his services at the time (Tr. 2584). Cross-examination thereupon continued for the remainder of the day (Tr. 2593–2676). That afternoon, during a recess, Cantellops spoke with Mr. Fraiman as to whether he should answer certain questions regarding his health as expressed in another letter which Cantellops had written his daughter. Mr. Fraiman advised Cantellops "to answer the questions that were put to him with respect to the letter" (Tr. 2679), and Cantellops answered all the questions put to him concerning the letter (Tr. 2663–2675). Subsequently, counsel for Evola and Gigante concluded his cross-examination, and the jury was excused for the weekend (Tr. 2676–2678). On Monday, February 16, 1959, the court granted permission to counsel for Evola and Gigante to re-open his cross-examination, and counsel inquired into other matters (Tr. 2703–2716).

b. Toward the close of the government's direct examination of Cantellops, the court ordered the United States Attorney to make Cantellops' grand jury testimony available to defense counsel (Tr. 1392). The United States Attorney complied with the direction, and also gave defense counsel a statement from Cantellops, dated October 10, 1957 (Tr. 1392, 1400–1401, 1479, 1592). In addition, the United States Attorney turned over the complete files of the New York Branch of the Bureau of Narcotics to the court for an *in camera* inspection of the reports (Tr. 1592–1593, 1615, 2018). The court spent thirty hours examining these files (Tr. 2052), and on February 4, 1959, conducted a *voir dire* examination of Agents Enright, Matuozzi, Consoli and Muglia concerning reports made by them of their activities regarding the case. The court turned over reports which the agents said were substantially verbatim accounts of statements from Cantellops (Tr. 2013–2018, 2019–2025; 2033–2037; 2042–2044).

On February 18, 1959, at the suggestion of the government, the court conducted a *voir dire* examination of Agent Rowan into four of his reports. Rowan testified that his "notes" were not in existence, and the court refused to inquire, as suggested by counsel for Evola and Gigante, whether the notes were "destroyed" (Tr. 3170). The court ordered portions of four of Rowan's reports, which according to Rowan's testimony were substantially verbatim statements from Cantellops, turned over to defense counsel (Tr. 3172–3173).

On February 19, 1959, an Assistant United States Attorney informed the court that a statement from Cantellops, dated January 16, 1958, had been found, and that he was prepared "to turn this over to defense counsel" (Tr. 3267). He stated that (Tr. 3268) "in the preparation of this case from its inception back in mid-1957, many different Assistant United States Attorneys have been involved, and during the course of the trial when counsel have asked whether certain documents were in existence I continually conferred with them, and this one turned up. When it turned up we turned it over. We can do no more than that."

c. The grand jury minutes turned over to the defense were of Cantellops' appearances in July 1957, March 1958 and June 1958.[9]

In his June 1958 appearances before the grand jury, Cantellops altered his March 1958 grand jury testimony in three material particulars:[10] (1) He testified that, following his first Miami trip, he met

[9] On July 30, 1957, Cantellops testified before the grand jury that he purchased his narcotics from Colletti (G.J. 3–5); that Colletti's supplier was Ralph Polizzano (G.J. 3); that he met Ralph Polizzano one week before Colletti was arrested (G.J. 5). At the trial, Cantellops testified that he was not cooperating with the grand jury in July 1957 (Tr. 2724).

[10] Cantellops also testified that Barcellona paid him $400, instead of $350, for the Las Vegas trip (G.J. 281–282; compare G.J. 54); that he mixed narcotics at "[d]ifferent places" on 1st Street and 109th Street, not in Curvello's apartment (G.J. 282); that, following the first Philadelphia delivery, Ormento paid him in a park, not in "Mexico's" apartment (G.J. 288–289); and that, following his Philadelphia deliveries, he returned to New York by bus, not by train (G.J. 294; compare G.J. 200).

Charles Di Palmero, not Carmine Polizzano, on the "other end" of his later trips to Miami, but that Carmine Polizzano had participated in the planning of the trips (G.J. 283–284; compare G.J. 94–99, 194, 228). (2) He testified that he traveled by automobile with Gigante to Lorain, Ohio, and then by bus to Cleveland, not by bus from New York to Cleveland (G.J. 290–293; compare G.J. 193–194). (3) He testified that he had seen Carmine Polizzano talking to Genovese, that Ormento introduced him to Genovese, and that Genovese participated at the end of a meeting where territorial control and the distribution of narcotics were discussed (G.J. 303–304, 306–309, 312). On March 18, 1958, Cantellops had testified before the grand jury that he saw Genovese only once, but that he "never had a chance to talk to him" (G.J. 146). Cantellops explained his "misstatements" as to Gigante and Genovese to the grand jury as follows (G.J. 290–291):

> A. I think—you may find some misstatements here is perhaps a period of long time, but in this particular instance [the Lorain, Ohio, trip with Gigante] it has not been a period of long time. It is a struggle I have been having, mentally, within myself. This period of this trip is what really has been having me thinking continuously if I do—I do not know my full help struggling with myself about doubts in my mind about the outcome of my future, and the natural law of self-preservation. Naturally, I hope that the same society that I am helping, I am protecting now, will be the same society that in the future will forgive my past errors and

will help me to straighten out, and perhaps be grateful for what I am doing.

The main thing in this point now, is now I am right now here, we are going to take one of the most dangerous sections of this syndicate. That's why I took so long for me to clear my mind and decide what I have to do.

So at that particular time I was ready to make a clear distinction where I think I should go ahead and help to the full extent, even knowing the risk that is involved.

So I thank you for that, gentlemen.

Q. Tell us now, about this trip to Cleveland.

THE FOREMAN. May I make a comment. I'd like to speak for the jury—that we appreciate what you are doing. We realize the dangers involved. You understand the testimony you give to us is secret and confidential. You must rely on us as citizens with a sense of social responsibility to keep your testimony secret and confidential, so that you should not have any fear of danger that will come from your disclosures to us.

THE WITNESS. I realize that, and that is why I am willing to go ahead and take the consequence. Because faith is one of the main things in human nature."

3. *The request for depositions*

The trial commenced on January 5, 1959, and terminated on April 3, 1959. On December 8, 1958,

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[11] In March 1958, Cantellops had told the grand jury that the people who informed or "talked" against the syndicate "just disappear[ed]" (G.J. 144–148). He said that he had been threatened on occasions, and that physical mutilation of a victim who "talked" is "common conversation among those people" (G.J. 148–149, 170–171).

counsel for Genovese informed the court that on December 6, 1958, Genovese had received a telephone call from Customs Agent Begendorf, whom Genovese had met two years earlier (Vol. I, 271–272). Counsel stated that Begendorf requested permission to see Genovese, and that an appointment was made with Genovese at the latter's home. According to counsel, Begendorf advised Genovese that the indictment had been obtained against Genovese for publicity purposes (Vol. I, 272–273). Counsel requested the court to "find out the reason why he (Begendorf) called my client" (Vol. I, 274). The court reserved a decision on this application until the United States Attorney investigated the incident (Vol. I, 276).

Later that afternoon, the United States Attorney reported to the court that Begendorf had been interrogated and that a statement in question and answer form had been taken from him. In this statement, Begendorf admitted telephoning and visiting Genovese, but denied saying that the indictment had been obtained for publicity or that the case was a "frame-up" (Vol. I, 287–288). Begendorf said that the visit with Genovese was his own idea, that it was unauthorized, that no one connected with the government had any knowledge of this visit, and that he made no report of his actions (Vol. I, 288–293). Counsel for the petitioner agreed that Begendorf's statement should be transcribed and made available to the court for inspection *in camera*, and that it would not be given to defense counsel unless it contained matter not accurately reflected by the United States Attorney's description thereof (Vol. I, 302). On the fol-

lowing day, a copy of this statement was given to the court for inspection *in camera*.

On December 12, 1958, Genovese moved, upon his affidavit, to take the deposition of Begendorf. The government submitted affidavits in opposition which indicated that Begendorf's visit with Genovese was not directed or suggested by the United States Attorney's Office, the United States Customs House, or the New York Office of the Bureau of Narcotics (Vol. I, 443–445; App. 1181–1186). Begendorf's affidavit stated that no one in any governmental agency instructed him to visit Genovese. Begendorf's affidavit also stated that he had not told Genovese he had been framed (App. 1188a). On December 30, 1958, the motion for depositions was denied (App. 132a).

On January 23, 1959, counsel for Evola and Gigante informed the court that he had received in the mail from an anonymous source two copies of memoranda of the Bureau of Narcotics, dated April 14, 1958, and May 5, 1958. At the close of the court day, this incident was discussed in chambers. The United States Attorney admitted that the memoranda, bearing the name of Narcotics Agent Enright, were "copies in part of agents' reports of the Bureau of Narcotics" (Tr. 1113L). The memoranda indicated that Begendorf was assigned to the narcotics squad of the United States Attorney's Office, and that an Assistant United States Attorney had indicated the existence of inaccuracies in Cantellops' grand jury testimony (Tr. 1113N, 1113Q). This information was subsequently passed on to counsel for Genovese.

On January 28, 1959, counsel for Genovese orally renewed his motion to take Begendorf's deposition on the ground that "an examination under oath will disclose whether or not he [Begendorf] did not go pursuant to direction by Mr. Enright or any one of his superiors to entrap or to get admissions from Mr. Genovese in order to present that at the trial here" (Tr. 1425). Thereafter, counsel for Genovese moved in writing to take the depositions of Begendorf and Enright (App. 1162a–1173a). The government submitted affidavits in opposition to this motion. The affidavit of Agent Enright stated, in part (App. 1179–1180a):

> * * * At the time I thought Agent Begendorf had been assigned to the Special Squad [of the Bureau of Narcotics] [*sic*] he had been present in our office at the United States Court House, Foley Square, upon various occasions together with Customs Agent James Flynn, who I am advised, was assigned to the Special Squad. I mistakenly assumed that Agent Begendorf was similarly assigned because he was together with Agent Flynn upon various occasions.
>
> I subsequently learned that Agent Begendorf was not assigned to the Special Squad. I was advised that he had been reporting to Agent Flynn during the early stages of his new assignment as a customs agent. At no time did I assign Agent Begendorf to any investigation of Vito Genovese.

On February 26, 1959, after argument by counsel, the court denied the motion for depositions, pointing

out that the incident had no relevance to the issues at the trial (Tr. 4003; see Tr. 1424–1430).

ARGUMENT

I

In varying forms all the petitioners contend that the evidence does not support their convictions. The matter was thoroughly considered by the court below and presents no issue requiring consideration by this Court.

a. The attack on the credibility of Cantellops [12] is an attempt to reargue an issue which was for the jury to determine. His manner of testifying and demeanor on the witness stand, his prior perjury and inconsistent statements before the grand jury,[13] the question

[12] Pet. No. 792 Misc., 15–19; Pet. No. 793 Misc., 9–12; Pet. No. 750 Misc., 4–9, 17–18; Pet. No. 817, 34–39.

[13] There is no doubt that Cantellops committed perjury when he appeared before the grand jury in July 1957 when, for example, he stated that he first met Ralph Polizzano "about a week before Solly (Colletti) was arrested" (G.J. 5). However, Cantellops testified at the trial that he was "not cooperative" at that time, a conclusion which is apparent on a reading of his July grand jury testimony (Tr. 1858; G.J. 1–36). Indeed, Cantellops had been instructed to "put up any story" until he could be reached "with legal aid or money" (Tr. 1155–1156, 2904–2905).

Subsequently, Cantellops had a change of heart, and in March 1958, in a series of appearances before the grand jury, he implicated all the petitioners except Gigante and Genovese. Prior to implicating these two petitioners, Cantellops told the grand jury that he was about to disclose "one of the most dangerous sections of this syndicate," that this had worried him for quite some time, that there was personal danger in exposing these men, but that, regardless of the personal risk, he would "go ahead and help to the full extent". It was for the jury to weigh that explanation.

Cantellops had also informed the grand jury in June that he had been mistaken in his March grand jury testimony, that

whether or not his testimony was worthy of belief, standing alone or corroborated, were matters affecting the weight, not the admissibility, of Cantellops' testimony. Counsel for the petitioners conducted an exhaustive and searching cross-examination of Cantellops before the jury, in which they hammered again and again at instances of grand jury perjury and inconsistent statements (Tr. 1838–1839, 1855, 1858, 1868–1872, 1873, 1956, 1963, 2253–2254, 2388, 2411–2413, 2463–2464, 2610–2611, 2659, 2810–2811, 2814, 2830–2831, 2869, 2871, 3031–3033, 3122–3123, 3125–3127, 3387, 3443). That the jury scrutinized Cantellops' testimony is apparent from the fact that the jury called for the transcript of the cross-examination of Cantellops conducted by Genovese's counsel, and that portion of Cantellops' testimony when he identified the defendant Fiano whom they acquitted.

The jury were instructed that an accomplice's testimony "should be viewed with great caution and scrutinized carefully" (Tr. 7174–7176). Petitioners were entitled to no more. *Holmgren* v. *United States*, 217 U.S. 509, 523–524; *Caminetti* v. *United States*, 242 U.S. 470, 495.[14] There is no occasion to consider peti-

Charles Di Palermo, not Carmine Polizzano, had met him at the "other end" of his later Miami trips (G.J. 282–283). Cantellops told the grand jury that the misstatements were due to a "period of long time," and unhesitatingly clarified the matter before the grand jury. Cantellops' March grand jury testimony, as modified by that given to the grand jury in June 1958, was substantially the same version of events as that testified to at the trial.

[14] The Lessas (Pet. No. 772, 17–22) and Genovese (Pet. No. 817, 45–47) contend that the trial court erred when, on summarizing the evidence, it failed to point out "variations" be-

tioner Genovese's claim (Pet. No. 817, 34–39) that this Court should re-examine the rule in the federal courts that corroboration of an accomplice's testimony is not required, for Cantellops, although not corroborated as to Genovese, was directly or circumstantially corroborated on so many material particulars that the claim must fall for want of a predicate. Corroborative testimony was introduced which indicated that Cantellops had put up a deposit and submitted his plans for a gambling device to the Sigma Electric Corporation (Tr. Peikes, 4701–4707); that he was present in Las Vegas and worked for a few days in the "Golden Nuggett" Casino in Las Vegas in late March 1955 (Tr. King, 5051, 5055); that 36 East 4th Street was Ralph Polizzano's narcotics distribution "plant" (Tr. Marino, 208–212, 301–304); that Marino delivered narcotics to Cantellops (Tr. 209–212, 277–282); that Ormento, Mazzie, Ralph Polizzano, Colletti, Contes, the Di Palermos and the Lessas were engaged in the narcotics traffic (see testimony of Marino, Contes and Basile in the Statement, *supra*); that Cantellops and Marino delivered narcotics to Aviles (Tr. Marino, 294–296); that Cantellops introduced Aviles to Ralph Polizzano (Tr. Marino, 289–290); that narcotics were

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tween Cantellops' trial and grand jury testimony. A court, in summarizing the evidence, cannot go into all details. The court's only duty is to fairly and accurately summarize the evidence adduced at the trial, and to inform the jury that the summarization is merely the court's recollection of the evidence, which, if contrary to the jury's independent recollection, need not be considered. *Starr* v. *United States*, 153 U.S. 614, 625; *Wiborg* v. *United States*, 163 U.S. 632, 656; *United States* v. *Murdock*, 290 U.S. 389, 394; *Quercia* v. *United States*, 289 U.S. 466, 470.

often hidden behind the toilet bowl in Al's Luncheonette (Tr. Marino, 230–231, 282); that Colletti and Russo were engaged in the narcotics traffic (Tr. Zurlo, 504–508; Dolce, 545–548; Palma, 582–589; Schrier, 629–647); that Ralph Polizzano knew Colletti and Russo (Tr. Zurlo, 504–508; Schrier, 643–644); that Marino worked at the Squeez-Inn Bar and delivered narcotics for Ralph Polizzano (Tr. Marino, 209–214, 228–231, 275–295); that Cantellops delivered narcotics to Contes in early August 1956 (Tr. Contes, 3773–3775); that Cantellops' description of the lobby of the Del Rio Hotel was correct (Tr. Okun, 5874–5875); that there was a "Montanes" and an "Alfonso" on Por Venir Street in Havana, Cuba, and that they engaged in the narcotics traffic there (Tr. Lopez, 5304–5308, 5317); that the "Marques de Comillas" and the "Talmanca" were ships operating out of Havana (Tr. Lopez, 5310–5312); that Joseph Di Palermo, Charles Di Palermo, Ormento, Santora and Contes were known to others as "Joe Beck," "Charley Brody," "Big John," "Tom Mix" and "Pete the Greek" (Tr. Contes, 3731, 3737–3738; Basile, 3900–3901, 3926–3929, 3949–3950).

b. Petitioners Ralph and Carmine Polizzano (Pet. No. 792 Misc., 19–21; Pet. No. 793 Misc., 16–19) lift numerous narcotics transactions out of context and argue that this evidence tended to prove "numerous unconnected small conspiracies." The evidence set forth in the Statement, however, shows that these petitioners were large suppliers who participated in policy decisions, directed or participated in Cantellops' trips

to get narcotics, and then sold the narcotics. Their participation in the selling end, such as the Aviles transactions, was in furtherance of the overall plan which was, not only to get, but to sell narcotics. This was a typical narcotics ring consisting of policy level importers and distributors at one end, the street level wholesalers at the other end, and the large wholesalers and their henchmen in the middle. Cf. *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863; *United States* v. *Tramaglino*, 197 F. 2d 928 (C.A. 2), certiorari denied, 344 U.S. 864; *United States* v. *Rich*, 262 F. 2d 415 (C.A. 2). See also *Blumenthal* v. *United States*, 332 U.S. 539, 558. These petitioners were at the upper level.

In view of that fact, the claim of Carmine Polizzano (No. 793 Misc.) that the number of defendants deprived him of a fair trial is without merit. By associating himself with a large conspiracy, petitioner risked trial with his numerous associates. *Kotteakos* v. *United States*, 328 U.S. 750, 773; *Allen* v. *United States*, 4 F. 2d 688 (C.A. 7), certiorari denied *sub nom. Hunter* v. *United States*, 267 U.S. 597.

Contrary to petitioner Joseph Di Palermo's contention that he was not part of one overall conspiracy (Pet. No. 812, 10, 11–15), the record indicates that the petitioner was continuously in the conspiracy. The fact that he purchased narcotics from an outside source until November 1955, as proved by the record in *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863, does not preclude the conclusion that he contemporaneously belonged to this conspiracy. The proof in *Stromberg* indicated that

this petitioner purchased from Vellucci narcotics imported from France which he resold to his customers, one of whom was Basile (Stromberg App. 608–612, 616–618, 623–625, 932–944, 963–974, 989–990). No mention was made in *Stromberg* of Cantellops and the Polizzanos and Barcellona, the people in the instant conspiracy with whom Di Palermo dealt from March to November 1955. The evidence here showed that Di Palermo assisted in the planning of the Las Vegas narcotics delivery in March 1955, the Chicago narcotics delivery in August 1955, and the two narcotics pickups which Cantellops made in Florida in June and October 1955. See the Statement, *supra*. The narcotics which Cantellops picked up in Florida came from Cuba (Tr. 1037–1038, 1094–1095), a fact which is fortified by petitioner's trip to Havana in November 1956 with one of his narcotics runners and Capece (Tr. 4581, 4591–4594, 4600). Thus the actors, events, and source of narcotics during the instant period were separate and distinct from the actors, events and source of narcotics in the *Stromberg* case.[15]

[15] Petitioner states (Pet. No. 812, 8) that "Cantellops' testimony concerning the petitioner during these nine months (March to November 1955) is in no way different from the testimony given by Basile in *United States* v. *Stromberg*, *supra*." (Stromberg App. 928–947, 952–990). In an attempt to place Cantellops in the same position as Basile as regards the petitioner, petitioner states (Pet. No. 812, 8), that "Cantellops purchased narcotics from the petitioner for re-sale (his tips for trips) as well as delivered the same from time to time for the petitioner." The record, however, indicates that Cantellops, unlike Basile, never purchased narcotics from Joseph Di Palermo and that Cantellops received his "tips" from Russo or Marino according to the promises made him by Carmine Polizzano (Tr. 1054–1055, 1122, 1124–1127, 1377–1378).

Subsequent to November 1955, Di Palermo planned with the Polizzanos for Cantellops' takeover of the narcotics territory of Gonzalez in 1956; he had many meetings with the Polizzanos, Cantellops and others when narcotics were discussed; he planned a pickup in April 1957. He was clearly in the conspiracy until he decided to "take a vacation" in June 1957.[16]

c. The evidence as to the individual defendants was, as the court below found, sufficient. We discuss the points raised by various petitioners briefly.

1. Carmine Polizzano (No. 793 Misc.) either planned or assisted in the wholesale distribution of narcotics throughout the United States, instructed Cantellops in picking up large quantities of narcotics in Florida, and arranged many meetings between Cantellops and high level conspirators. See the Statement, *supra*. To support his contention that the case against him "hung by a thread", this petitioner relies on the fact that Cantellops implicated and identified one "Carmine J. Polizzano" to a narcotics agent, instead of the petitioner, "Carmine A. Polizzano", and that Cantellops identified "Carmine J. Polizzano" before the grand jury in March, and did not identify the petitioner before the grand jury until June 1958. But

[16] In support of his contention that multiple conspiracies were proven, Di Palermo argues (Pet. No. 812, 11-15) that the August 1956 meeting in Mazzie's apartment was designed to eliminate competition from Rodriguez, Ralph Polizzano's customer in the Bronx, and hence to eliminate petitioner who was connected with Ralph Polizzano. But Di Palermo and Ralph Polizzano discussed with Ormento and Cantellops in 1955 and 1957 the feasibility of "sealing" off the lower East Side, so that, whatever the relationship of the two areas, Ormento was clearly not trying to keep Di Palermo and Ralph Polizzano out of the narcotics business.

neither the narcotics agent nor the Assistant United States Attorney who was conducting the grand jury investigation requested Cantellops to connect the picture of Carmine J. Polizzano to the conspiracy; they merely requested Cantellops to identify the picture, which he did (G.J. 241–242; Tr. 2845–2846, 3223–3224). The identification of Carmine J. Polizzano's picture before the grand jury in no wise placed a duty on Cantellops to distinguish the two Polizzanos because he was not only asked to identify this and other pictures in rapid sequence (G.J. 241–247), but was shown other pictures of individuals who were also unconnected with the conspiracy (G.J. 243, 244). And the Assistant United States Attorney could hardly be expected to request that Cantellops describe the connection which Carmine J. Polizzano had with the conspiracy, for Cantellops had testified about a "Carmine Polizzano" and had identified a "Carmine Polizzano." There was, therefore, no mis-identification of the petitioner before the grand jury, nor did Cantellops knowingly mislead the grand jury or the narcotics agent. It was evidently a simple misunderstanding."

2. Santora (Pet. No. 763, 3–11) participated with other top level co-conspirators in a lengthy meeting which brought about the importation of a large quantity of narcotics through Florida; attended two secretive meetings in the darkened park with Mazzie, Ormento and Cantellops (and with Evola at the second such meeting) when the distribution of narcotics was

[1] Petitioner Charles Di Palermo terms this entire incident as "monstrous and shocking" perjury (Pet. No. 750 Misc., 8–9).

planned; was present with Mazzie in a darkened park when Ormento paid Cantellops for the first Philadelphia delivery of narcotics; and arranged the second distribution of narcotics to Philadelphia through Cantellops. See the Statement, *supra*. This conduct indicated petitioner's knowledge of the broader scope of the conspiracy in importing and distributing wholesale quantities of narcotics. It is immaterial (see Pet. No. 763, 8) that evidence of Santora's contact with the conspiracy is apparent only in August 1956, for as long as there is "knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users," he may lawfully be regarded as one of the "accredited members of the conspiracy." *United States* v. *Rich*, 262 F. 2d 415, 418 (C.A. 2); see *Williamson* v. *United States*, 207 U.S. 425, 449; *Lefco* v. *United States*, 74 F. 2d 66, 68 (C.A. 3).[18]

3. Petitioners Daniel and Nicholas Lessa contend (Pet. No. 772, 6-10) that the evidence was insufficient to support their convictions because it indicated that the petitioners, "on two occasions, purchased an undisclosed amount of narcotics from two persons who were shown by evidence not connected with appellants." Apparently, petitioners are referring to the two narcotic deliveries which Cantellops made to

[18] Santora compares the delivery of narcotics which Cantellops made for him with the deliveries Cantellops made for Ormento, and argues that the Santora delivery was an "independent venture" because there was no "security man" at the delivery site. Cantellops, however, delivered narcotics for many members of the conspiracy. No "security man" was present when Cantellops mailed narcotics from Puerto Rico.

them for Ormento and Mazzie in August 1956 (Tr. (1279–1283, 1286–1290). But petitioners omit the salient facts that Ormento and Mazzie prompted Daniel Lessa in January 1956 to supply narcotics to Contes, that Daniel Lessa instructed Nicholas Lessa to make the first of many deliveries to Contes, that Nicholas Lessa supplied Contes with from three to five ounces every ten days until August 1956, that Mazzie was at the delivery site when Cantellops made his second delivery of narcotics to the Lessa brothers, that Cantellops delivered a quarter kilo of heroin to Contes for Mazzie after Contes had placed this unusually large order with Nicholas Lessa, and that Mazzie arranged for, and paid Cantellops, for this large delivery to Contes (Tr. 1269–1273, 1288–1289, 3755–3768, 3771–3775, 3801). This was direct evidence that the petitioners knowingly and actively participated in the conspiracy at the wholesale narcotics-distribution level.

4. Barcellona contends (Pet. No. 840 Misc., 14–16) that the evidence was insufficient to support his conviction because his only contact with the conspiracy was "a single isolated narcotics transaction" involving his participation in the Las Vegas trip. The evidence, however, indicated that Barcellona was acting in concert with Joseph Di Palermo who assisted in planning the Las Vegas delivery (Tr. 993–998, 1031–1033) and Carmine Polizzano who instructed Cantellops to get in touch with Barcellona for the "payoff" (Tr. 1031). In addition, petitioner supplied Cantellops with narcotics in April and May 1955 (Tr. 1034–1037). Much more is present here than in those cases which have affirmed the conspiracy conviction

of a defendant whose "one act" was sufficiently probative of conscious participation in the criminal enterprize charged in the indictment. See, *e.g.*, *Parente* v. *United States*, 249 F. 2d 752, 753 (C.A. 9); *United States* v. *Farina*, 184 F. 2d 18, 19 (C.A. 2), certiorari denied, 340 U.S. 875; *United States* v. *Carminati*, 247 F. 2d 640, 642, 643 (C.A. 2), certiorari denied, 355 U.S. 883.

5. By comparing Cantellops' trial testimony concerning Evola at the second meeting in "Mexico's" hotel room with Cantellops' grand jury testimony concerning a "third meeting" in "Mexico's" hotel room with Galente and others (G.J. 179), and by comparing Cantellops' description of Galente before the grand jury on March 20, 1958, with Cantellops' correct identification of Evola's photograph before the grand jury on March 26, 1958, petitioner Evola contends (Pet. No. 735, 7–12) that Cantellops "substituted" Evola for Galente. Aside from the fact that this contention concerns itself only with Evola's complicity at the second meeting in "Mexico's" hotel room where the importation of narcotics was discussed, nothing in the record warrants the contention that Cantellops substituted Evola for Galente. Cantellops did not confuse Evola with Galente before the grand jury or at trial, and petitioner's comparisons of Cantellops' trial and grand jury testimony, above, are improper.[19] By his participation

[19] Evola's trial counsel in his summation, read the grand jury testimony of Cantellops describing Galente, and then requested Evola to stand so that the jury could see the obvious difference between the two men (Tr. 6364–6362).

in two meetings where either the importation or territorial distribution of narcotics was discussed, and by his assisting Ormento in instructing Cantellops regarding a delivery of narcotics in Brooklyn in August, 1956, the evidence sufficiently indicated that Evola not only knew the scope of the conspiracy and voluntarily associated himself with it, but that he knowingly participated with his co-conspirators in promoting its objects.[20]

[20] There was no flat contradiction between the dates Cantellops gave for a narcotics meeting attended by Cantellops, Evola and others, and the date given by Cantellops for his Puerto Rican narcotics trip, as Evola contends (Pet. No. 735, 10–11), for Cantellops only approximated the dates of these two events as the "[e]nd of August or beginning of September, 1956" (Tr. 1291, 1321; 2637), and testified that he was in Puerto Rico during the early part of September, 1956 (Tr. 1321, 3437). Nor was there necessarily a contradiction between Cantellops' trial and grand jury testimony as to whether Santora or Evola suggested that the narcotics be imported through Miami (see G.J. 170, 240, and Tr. 1229A), for Cantellops testified that all participated in the conversations (Tr. 1229). And petitioner's contention that "there was no Mexican living at this hotel [the Del Rio Hotel] during the summer of 1956 and that it was then not a transient hotel" is not supported by the testimony of Mr. Okun on whose testimony petitioner predicates the contention. Mr. Okun, on cross examination by the Government, admitted that he judged the nationality of occupants whom he did not see by the name signed in the register (Tr. 5883–5884); that he did not see each registrant, let alone visitors, who were not even recorded (Tr. 5885–5886); that he was unable to be at the Del Rio Hotel all the time due to his four other hotels, one of which was in Hartford, Connecticut (Tr. 5865); that during early August when the meetings transpired in "Mexico's" hotel room, the hotel records, on which he relied, were kept by him and others (Tr. 5868–5870, 5875–5876). When confronted by his own hotel records, which indicated transient guests at a subsequent time, he testified that there were transients that he did not know about. (Tr. 5880–5885). Moreover, the meet-

6. Gigante's knowledge of the chief conspirators, in conjunction with the fact that he drove Cantellops to Lorain, Ohio, knowing that narcotics were hidden in the trunk and that Cantellops was to take the narcotics to Cleveland, and that he drove Genovese, Ormento and Cantellops to Mazzie's house, knowing that the meeting would concern itself with the territorial control of narcotics, sufficiently indicated that Gigante knew the scope of the conspiracy and that his transportation of Cantellops with the narcotics furthered its objects.

7. After omitting several salient facts in the record,[21] petitioner Capece contends that the evidence is insufficient to support her conviction, and that the court committed prejudicial error in allowing testimony concerning the large sum of money found on her person, following her return to New York from Havana, Cuba (Pet. No. 807, 20–26). The record,

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ings with "Mexico", in conjunction with Ormento's request that Cantellops entertain "Mexico" for a few days (three days) (Tr. 1230–1231) indicated that "Mexico" was at the Del Rio Hotel for six days and quite probably more, thus qualifying as a weekly guest at the hotel (Tr. 5853).

[21] For example, petitioner argues (Pet. No. 807, 23–24) that the evidence did not disclose that petitioner "knew the contents of the package" which she passed to Basile. The record, however, indicates not only that Joseph Di Palermo and Basile discussed narcotics prior to the delivery, but that Joseph Di Palermo was angered at the risk of being exposed to one of Basile's customers who was nearby (Tr. 3946–3948). Again, petitioner's restatement of the Havana trip, and her argument predicated thereon, omits the salient fact that the Havana trip followed a meeting during which Di Palermo was advised that he should not expect any more narcotics from Cuba for the rest of the year (Tr. 1338–1340).

however, indicates that the petitioner actively assisted Joseph Di Palermo in the distribution of large quantities of narcotics to Joseph Basile; relayed messages from Basile to Joseph Di Palermo; arranged meetings between the two men, and received money from narcotics transactions.

The evidence concerning petitioner's Havana trip, her "traveling companions" and the discovery of a large sum of money on her person following the return to New York, when coupled with the fact that two months prior to the Havana trip Joseph Di Palermo had been advised not to expect any more narcotics from Cuba for the rest of the year, was a circumstance relevant to petitioner's complicity in the conspiracy. See *Heike* v. *United State*, 227 U.S. 131, 145; *Clune* v. *United States*, 159 U.S. 590, 592, 593; *Phelps* v. *United States*, 160 F. 2d 858 (C.A. 8), certiorari denied *sub nom. Peters* v. *United States*, 334 U.S. 860.

8. Genovese's participation at a meeting with several top conspirators where the territorial control and distribution of narcotics was planned, his associations with other top narcotics conspirators, when coupled with the fact that policy decisions were to be referred to "The Right Man", a name by which the petitioner was known, amply supports the finding of the court below that "he had a real interest and concern in the success of the conspiracy." 274 F. 2d 179, 188. See the Statement, *supra*.

II

The various objections to the trial court's rulings during the course of the trial are without merit.

a. The contention of petitioner Evola that his right of cross-examination was injuriously affected when

the court relaxed the rule of sequestration to allow Cantellops to speak to his daughter (Pet. No. 735, 13–16) is, as the court below ruled, without merit. The rule of sequestration is designed to prevent prospective witnesses from matching their testimony with that elicited from other witnesses, and its application is vested in the sound judicial discretion of the trial court. *Mitchell* v. *United States,* 126 F. 2d 550, 553 (C.A. 10), certiorari denied, 316 U.S. 702; *Kaufman* v. *United States,* 163 F. 2d 404, 408 (C.A. 6), certiorari denied, 333 U.S. 857. Petitioner's contention that he lost the "potency" of his cross-examination because of "[a] day's suspension of cross-examination" is without foundation in fact. Following the noon recess on February 11, the jury was excused and the afternoon session was taken up with legal argument on two government motions without objection by counsel for defendants. On the following day, Cantellops was cross-examined fully on the same subject matter on which he was cross-examined up to the noon recess of February 11.

No error was committed when the trial court appointed counsel to advise Cantellops regarding his constitutional rights. The court may properly take whatever steps are necessary to protect the constitutional rights of witnesses under such circumstances (see *Hamer* v. *United States,* 259 F. 2d 274, 282 (C.A. 9), certiorari denied, 359 U.S. 916; *Gruher* v. *United States,* 255 Fed. 474, 477 (C.A. 2)). No possible prejudice to the petitioner resulted since counsel advised Cantellops to answer all questions put to him regard-

ing the subject matter raised on cross-examination. (See the Statement, *supra*, p. 18.) As the court below noted, the trial court was "exceedingly generous in the latitude it gave counsel in cross-examining Cantellops, even to the point of permitting considerable repetition and minute inquiry into many matters of doubtful relevance." 274 F. 2d at 192–193.

b. Pointing to the fact that the trial court refused to order Cantellops (who was then in federal custody pursuant to a writ of habeas corpus ad testificandum) to attend a pretrial meeting with counsel for Rodriquez, wherein counsel proposed to ask Cantellops whether he would consent to an interview, petitioners Capece and Joseph Di Palermo[22] contend that they were prejudiced in preparing for trial (Pet. No. 807, 5, 7, 18–20; Pet. No. 812, 17).[23] The short answer is that the trial court permitted counsel to address a communication to Cantellops requesting an interview (Vol. I, Minutes of hearing, December 9, 1958, pp. 339–343). See *Dicks* v. *United States*, 253 F. 2d 713 (C.A. 5). Counsel for Rodriquez indicated that he would not avail himself of this oppertunity, and nothing in the record indicates that petitioners addressed such a communication to Cantellops. The court acted within its proper area of discretion in allowing defense counsel a different mode of access to Cantellops. Petitioners, who apparently did not try to communi-

[22] The trial court ruled that motions made on behalf of one defendant would be deemed to have been made by all defendants unless there was a specific disassociation with the motion.

[23] Petitioner Geniovese raises this issue, but does not argue it (Pet. No. 817, 41).

cate with Cantellops, have no basis for complaint. The issue was not even raised in the court below, except by Rodriquez.

c. The contention of petitioner Genovese (Pet. No. 817, 42–43) that the trial court erred in failing to require an inquiry "under oath and subject to cross-examination" into "Begendorf's purposes and information" in visiting Genovese on December 6, 1958, is frivolous. Petitioner's motions to take the depositions of Begendorf and Enright, as set forth in the Statement, *supra*, pp. 24–25, were properly denied, for not only were Begendorf and Enright available for call as witnesses, but the subject matter concerning which their examinations were sought consisted of the collateral issues of whether Begendorf had ever been assigned to Enright's squad and what Begendorf's "purposes and information" were in visiting Genovese, matters clearly outside the scope of Rule 15, F.R. Crim. P. Cf. *United States* v. *Broker*, 246 F. 2d 328 (C.A. 2), certiorari denied, 355 U.S. 837. Petitioner's assertion (Pet. No. 817, 42–43) that the trial judge was "hostile" to the inquiry is without foundation in fact. The court patiently listened to the many arguments of counsel (See Vol. I, 271–507a; Tr. 3993–4003), including the suggestion that it disqualify itself (Tr. 4001–4002), invited counsel to submit briefs (Vol. I, 431, 450), and reserved decision until it could study the authorities (Vol. I, 450–452). It earned the comment of the court below that "[t]he trial judge ex-

hibited commendable patience and courtesy in the face of such maneuvers." 274 F. 2d at 195.[24]

d. Petitioner Genovese argues (Pet. No. 817, 39–41) that there is nothing in the opinion of the court of appeals to indicate that consideration was given to the rulings of the trial judge, as set forth in the Statement, *supra*, regarding production of reports of statements by Cantellops.[25] Since neither the petitioner nor his codefendants raised this issue in the court below, petitioner's argument falls with his predicate. Actually, petitioner was given all that was due him under 18 U.S.C. 3500 when the trial judge, following a lengthy *in camera* inquiry into the reports and *voir dire* examination of the narcotics agents, ordered the production of all portions of the agents' reports which were substantially verbatim accounts of what Cantellops had told them. See the Statement, *supra*, pp. 19–20. And the fact that the petitioner had "no way of knowing the contents of those reports" is of no import,

[24] Petitioner's reliance on *Nardone* v. *United States*, 308 U.S. 338, is misplaced. In *Nardone*, this Court reversed the conviction of the petitioner because the trial judge refused to allow him to inquire into the uses which the government had made of illegally obtained evidence secured through wiretapping. *Id.* at 339, 341–342. In the instant case, however, there is not only no question of illegally obtained evidence, but the data sought from Begendorf and Enright could have been obtained by the petitioner through the simple expedient of calling them as witnesses.

[25] Petitioner misstates the record when he asserts (Pet. No. 817, 27–28) that the trial judge "refused to make available to the defense" six of Consoli's reports, Enright's April 14, 1958, report and Muglia's two reports. The record indicates that the trial judge ordered the production of the substantially verbatim statements of Cantellops found in each of the six Consoli reports (Tr. 2033, 2035, 2037), and those substantially verbatim accounts of Cantellops found in Enright's April 14th report (Tr. 2042) and Muglia's report of April 25, 1958 (Tr. 2043).

for as this Court noted in *Palermo* v. *United States*, 360 U.S. 343, 354, "It would indeed defeat" the purposes of 18 U.S.C. 3500 "to hold that the defense may see statements in order to argue whether it should be allowed to see them."

e. A New York policeman testified to admissions by Ralph Polizzano (No. 792 Misc.) at the time of his arrest. After Marino had testified that police had struck the petitioner, the petitioner moved for a hearing on the voluntariness of his admissions (Tr. 409–411, 432–434), a request which was granted. Petitioner contends that questions asked at that hearing rendered it unfair (Pet. No. 792 Misc., 11–12).

The questions were proper. The court properly questioned the petitioner regarding his past arrests, for "one without experience, possessed of little knowledge, may be more readily intimidated and more quickly influenced by threats or offers of reward than those possessing more experience and greater fortitude." *Murphy* v. *United States*, 285 Fed. 801, 808 (C.A. 7). Cf. *Thomas* v. *Arizona*, 356 U.S. 390, 401. And the inquiries by the United States Attorney into petitioner's plea of guilty to a New York charge of "attempted felonious possession of narcotics" was relevant to the issue of voluntariness, since the New York charge was predicated on the circumstances surrounding petitioner's arrest, including his admissions in question (Minutes of hearing, January 28, 1959, pp. 52–56 (following Tr. 1432a)).

At the conclusion of the first phase of the hearing, the court found petitioner's testimony to be "entirely incredible" and contradictory to the testimony of

Marino on whom he relied. Nevertheless the court permitted the government witnesses to testify "just [to] complet[e] the record" (Minutes of hearing, January 28, 1959, pp. 83–84). In its instructions to the jury, after stating the disputed facts, the court charged (Tr. 7155–7156):

> Ladies and Gentlemen, if you find that the statements which Detective Gibbons testified were made to him by Ralph Polizzano were in fact made, but that they were not made voluntarily but only out of fear of physical harm, I then instruct you to disregard such statements entirely and not to allow them to play any part in your deliberations. In any event you may not consider such statements in connection with the guilt or innocence of any of the other defendants since those statements were introduced and admitted solely as against Ralph Polizzano.

Petitioner was entitled to no more. *Wilson* v. *United States*, 162 U.S. 613, 614; *Smith* v. *United States*, 268 F. 2d 416, 420–421 (C.A. 9); *Wright* v. *United States*, 250 F. 2d 4, 13 (C.A. D.C.).[26]

f. Also without merit are the contentions that the courtroom outburst of the defendant Fiano (Tr. 5091–5096), after eleven weeks of trial, prejudiced

[26] Ralph Polizzano (Pet. No. 792 Misc. 22–23) argues that, in view of his conviction in New York for the acts as to which Detective Gibbons testified to at the instant trial, his conviction violated the policy announced by the Attorney General that the federal government would not normally prosecute for the same transaction for which a state prosecution had been brought. That policy has no application here, for the events at the time of this petitioner's arrest in July 1957 were only a small part of his extensive involvement in the conspiracy from 1955 to 1957.

petitioners.[27] During testimony as to Fiano he blurted out a statement that "[t]hey are all convicts right here." The following ensued (Tr. 5092–5093):

> THE COURT. Ladies and gentlemen of the jury: Some statements were made by the defendant Louis Fiano. He was not on the stand. His statements are not proof. They were entirely unsolicited. You are to totally disregard them.
>
> DEFENDANT FIANO. You don't need a United States Attorney; you do a good job. Bring the man in here and then bring out here I am incarcerated or anything else. This is worse than Germany, for God's sake. This is worse than Germany. They forgot the Constitution.
>
> THE COURT. The United States Marshal is expected to do his duty and use as much force as necessary in order to accomplish his duty.
>
> Ladies and gentlemen, you heard the last comments and you are to pay as much attention to the other comments that were made as to the last comments. The Court, unfortunately, cannot give you his views at this time with respect to the defendant, but all the statements that he made to you are to be completely disregarded. There is no proof of anything that he said, and the only thing you take into your mind when you consider, when you come to deliberate, is what you hear from the witness stand, not irresponsible utterances from anybody, and the Court, of course, strikes them all out.

[27] Pet. No. 793 Misc., 12–13; Pet. No. 792 Misc., 13–14; Pet. No. 750 Misc., 22–23. Petitioner Genovese joins in this issue, but does not argue it (Pet. No. 817, 41).

In moving for a mistrial, one defense counsel said his client had no record. The court, after repeating its admonition to follow instructions, said (Tr. 5096):

> Now, the statement made by one of the counsel was entirely irregular. That is all the Court can say at this time. But you are not to assume that because one counsel rises to say that his client does not have a criminal record, first, you are not to assume from that that that is the truth, nor are you to assume from that that any other one single defendant has any conviction against him.
>
> And, I am sure, ladies and gentlemen, that you will obey this instruction and that it won't be necessary to declare a mistrial after this 11 weeks because of the misconduct of a defendant and then the misconduct of a lawyer.

That the jury subsequently acquitted Fiano (as to whom the testimony showed only the delivery of a package of narcotics on Cantellops' first trip, several long-distance telephone conversations with a few of the conspirators, and the possession of two nonpublished telephone numbers of two conspirators) indicates how well the jury followed the instructions to disregard the incident. *Reistroffer* v. *United States*, 258 F. 2d 379, 392–393 (C.A. 8), certiorari denied, 358 U.S. 927; *Aeby* v. *United States*, 206 F. 2d 296, 300 (C.A. 5), certiorari denied, 346 U.S. 885.

g. Petitioners Ralph and Carmine Polizzano (No. 792 Misc. and No. 793 Misc.) complain of the introduction into evidence of a post-conspiracy confession of co-defendant Aviles which referred to a "Ralph" whom Aviles allegedly met in the "Squeez-Inn Bar" (Tr. 5485–5492). Ralph Polizzano contends that the

confession corroborated the testimony of Cantellops and Marino because it related that "Ralph" wanted Aviles to buy narcotics directly from him instead of the "Spanish fellow", that Aviles purchased narcotics from "Ralph," and that "Junior" delivered narcotics to Aviles (Pet. No. 792 Misc., 9–11). Petitioner Carmine Polizzano's complaint,[28] which he is raising for the first time in this Court, is that the confession related that Aviles met "Ralph" in the "Squeez-Inn Bar," an establishment which petitioner had earlier stipulated that he owned and operated during the period in question (Pet. No. 793 Misc., 15–16; see Tr. 5425). The trial court, however, not only emphasized the requirement throughout the trial and in its jury instructions that the jury had to deliberate on the guilt of each defendant on a separate and individual basis (Tr. 64–65, 689, 5093, 5294, 6124, 7077–7080, 7094–7097, 7099, 7102, 7105–7106, 7110, 7119, 7122, 7126, 7129, 7131, 7134, 7140, 7150, 7156, 7157, 7159, 7180), but admonisned the jury on five occasions that they could consider the confession only against Aviles and no one else (Tr. 5474–5475, 5484–5485, 5492–5493, 7098, 7223–7224). These admonitions were re-emphasized when, prior to transmitting the confession to the jury as requested, the court ordered the word "Ralph" deleted from the confession and instructed the jury that "a name * * * is going to be deleted" because the confession, if made at all, "is not to be considered against anybody other than himself" (Aviles) (Tr. 7223–7224). The jury must be

[28] Carmine Polizzano, clearly, has no standing to complain that the trial court erred in denying Aviles' request that he be accorded a hearing into the voluntariness of the confession.

presumed to have followed these instructions. *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95.

III

Cantellops pleaded guilty in the General Sessions Court of New York County to the charge of attempted felonious possession of a narcotic drug. On November 26, 1957, he was sentenced to serve a term of imprisonment of from three years and nine months to four years and six months. He was named as a co-conspirator, but not a defendant, in the instant indictment (App. 50–51a).

Cantellops testified that no promises or threats were made to him by the government for his testimony (Tr. 1965–1972, 2217, 2597–2598, 3260). In their arguments to the jury, several of the defense counsel stated that the government had coached Cantellops, that his entire story was a "fairy tale," and that the government made promises to Cantellops for his testimony (Tr. 6321–6322, 6503, 6686, 6716; see Tr. 6230, 6286). In his closing argument to the jury, the United States Attorney said (Tr. 6756–6758):

> Counsel have also suggested to you that Cantellops had a motive to lie. But let us see what motive Cantellops could have had. He was picked up in July of 1957 and he talked to the agents and to Shaw after his arrest. He appeared before the grand jury at the end of July, 1957, and in August he pleaded guilty; and that was plea that covered two indictments.
>
> Now, what kind of consideration did he get? His sentence was three years and nine months to four years and six months and he was sentenced on November 26, 1957. So it is apparent

that Cantellops is still in jail and has some time to go.

* * * * *

Cantellops made only one appearance before the grand jury before he appeared in March of 1958, and at that time, in March of 1958, Cantellops had already been sentenced. He had gotten his time.

Now, if as counsel suggest, he got a minimum sentence, what point would he have, what motive would he have to come in here and make up a story? It would be much easier for him to do his time and not expose himself to this. The earliest he could have gotten out would be three years nine months, less time for good behavior. Nobody could get him off of that. So the consideration that he got, if you would believe counsel, it seems to me, would hardly be that which would make a man invent a story. He had gotten his time. He would be better off to keep quiet.

On July 1, 1959, the Governor of New York commuted Cantellops' minimum sentence of three years and nine months to two years and eight days, leaving the maximum term of imprisonment at four years and six months. On July 16, 1959, the New York State Parole Board placed Cantellops on parole. His parole will terminate on January 8, 1962. Prior to the Governor's action, the present United States Attorney, Mr. Gillespie, had called the attention of the Governor to the cooperation of Cantellops and had requested that consideration be given to the possibility of an earlier parole date.

Two petitioners (Pet. No. 750 Misc., 11–14, 19–22; Pet. No. 817, 43–45) argue that this shows that Can-

tellops was lying and that the argument of counsel was improper. The mere fact that some clemency was accorded Cantellops after the trial does not show that promises were made to Cantellops before trial. The fact that Cantellops did not begin to cooperate with the federal grand jury until March 1958, after his sentencing in the state court, supports this claim.[29] Unlike *Napue* v. *Illinois*, 360 U.S. 264, where the prosecutor did nothing to correct the false testimony of a witness whom he had promised consideration, the evidence here is uncontradicted that no promises were made to Cantellops, and there is no basis for the assertion that the United States Attorney knew the testimony was untruthful.

The closing argument of the United States Attorney, when read in context, does not carry the implications petitioners place on it. It was proper to point out that Cantellops had already been sentenced for the state crime in November 1957, before he began to cooperate with federal authorities in March 1958, and that it would have been easier for him to serve the sentence than run the risks that came from disclosure. Petitioners seize on one statement in the whole long argument—that no one could get Cantel-

[29] The statement in Pet. No. 750 Misc. that Cantellops began to cooperate with the federal authorities in July 1957, before he was sentenced in the state court, is refuted not only by Cantellops' testimony at the trial that he was "uncooperative" at that time, but by the grand jury minutes themselves which disclose the evasive, perjurious responses of Cantellops to questions put to him before the grand jury in July 1957. The New York judge who sentenced Cantellops on November 26, 1957, did allude, however, to some general form of cooperation between Cantellops and the federal authorities at that time. This was brought out at the trial (Tr. 2288–2289).

lops off of that sentence—but when read in relation to the preceding and following sentences, it is evident that this referred to the position of Cantellops when he decided to cooperate—*i.e.*, the position of a man already under sentence.

IV

Three petitioners (Pet. No. 792 Misc., 14–15; Pet. No. 793 Misc., 13–14; Pet. No. 817, 30–34) contend that they could not receive a fair trial because of adverse publicity. The pre-trial publicity complained of occurred mostly at the time of arrest and arraignment in the summer of 1958, about five months before trial. None of the jurors had read any of the questioned newspaper publicity. During the trial, the court admonished the jury (or reminded the jury of its admonition) on eighty separate occasions to refrain from reading any publicity regarding the case, or from listening to any radio or television broadcasts regarding the case, or from discussing the case with anyone, or from remaining in the presence of anyone who was discussing the case.[30] On February 16 and 17, 1959, in response to questioning, the jurors indicated that they did not read any articles concerning the case (Tr. 2705, 2861). Two days before the case

[30] Tr. 68, 141, 238, 415, 529, 591, 661–663, 688–689, 770–770a, 846–847, 863–864, 882, 1004–1005, 1011, 1106–1107, 1109–1110, 1192–1193, 1263–1264, 1347, 1394–1395, 1527, 1612–1613, 1803–1804, 2009–2010, 2153, 2263, 2271–2273, 2343, 2428, 2545, 2626, 2677–2678, 2848, 2934, 2983, 3056–3057, 3158, 3264–3265, 3369–3369a, 3493–3493a, 3536–3538, 3624, 3690–3691, 3884, 3986, 4102–4104, 4284–4285, 4366, 4463, 4530–4531, 4602, 4694, 4743–4744, 4792–4793, 4878–4879, 5210a, 5272–5273, 5353–5354, 5415–5416, 5497, 5511, 5707–5708, 5729, 5814, 6031, 6080, 6125–6126, 6239, 6293–6294, 6344, 6398–6399, 6449–6449a, 6523–6524, 6592–6592a, 6669, 6741–6743, 6795, 6881–6882, 7057–7060, 7218.

was submitted to the jury, petitioners refused the court's offer to inquire of the jury again (Tr. 6681). Unlike *Marshall* v. *United States*, 360 U.S. 310, where this Court reversed the conviction of the petitioner because a substantial number of the jurors had read prejudicial newspaper accounts concerning the petitioner and his wife, the instant case presents no such problem, for the jurors never read any of the prejudicial publicity.[31]

V

The Lessas contend (Pet. No. 772, 11–17) that convictions in *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863, precluded their trial in the instant case on the ground of double jeopardy. As discussed above, the *Stromberg* record shows that it involved a different conspiracy relating to narcotics imported from France.

Petitioners were connected with the *Stromberg* conspiracy through their wholesale purchases of narcotics from Vellucci, who was not mentioned in the instant conspiracy (*Stromberg*, App. 478–483). On November 5, 1955, petitioners lost their source of narcotics when Vellucci was arrested (*Stromberg*, App. 583–586). They then turned to Ormento for their supply of narcotics, and through August 1956 had narcotic transactions with Ormento, Mazzie and Contes, with Cantellops delivering narcotics to the petitioners for Ormento (see the Statement, *supra*). Since the petitioners joined and

[31] The situation here is totally unlike that in *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1), on which petitioner Genovese relies, where a Congressional subcommittee held hearings in the city of trial following the return of the indictment with respect to the precise issues upon which the defendant was tried.

actively fostered the ends of the instant conspiracy, as distinguished from their participation in the *Stromberg* conspiracy, they could be punished for their participation in this separate criminal enterprise.

VI

Petitioner Barcellona contends (Pet. No. 840 Misc., 12–14) that his conviction should be reversed because he did not have the assistance of counsel at every stage of the proceedings against him. While it is true that petitioner did not have counsel from July 17, 1958, until November 25, 1958, when the court appointed Roy L. Reardon to represent him, that fact in no way prejudiced petitioner. The court ruled that petitioner would receive the benefit of all pretrial motions made on behalf of his co-defendants. Counsel had six weeks within which to prepare petitioner's defense. He neither moved for a continuance nor complained that he had insufficient time in which to prepare for trial. Petitioner does not suggest that anything which properly could have been done was not done. Petitioner's constitutional right to counsel was satisfied, for he had the "effective aid of counsel in the preparation and trial of the case." *Edwards* v. *United States,* 139 F. 2d 365, 367 (C.A.D.C.), certiorari denied, 321 U.S. 769; *Maye* v. *Pescor,* 162 F. 2d 641, 643–644 (C.A. 8); *United States* v. *Bergamo,* 154 F. 2d 31, 34–35 (C.A. 3); *Gadsden* v. *United States,* 223 F. 2d 627, 631 (C.A.D.C.); *United States* v. *Wright,* 176 F. 2d 376, 379 (C.A. 2). Cf. *Avery* v. *Alabama,* 308 U.S. 444, 446; *Powell* v. *Alabama,* 287 U.S. 45, 71.

VII

Petitioner Genovese offers to this Court for evaluation a number of items of allegedly newly-discovered evidence (Pet. No. 817, App. D) which he claims so impeach the credibility of Cantellops as to call for a reversal of his conviction. The proper place to present this evidence is in the district court by a motion for a new trial under Rule 33, F.R. Crim. P. Petitioner has chosen not to follow that procedure, but to present the items first to the Solicitor General in a special communication and then to this Court in the petition for certiorari. Since the materials presented call in question the integrity of a narcotics agent and an Assistant United States Attorney (App. D–3), and counsel has called upon the Solicitor General to consider them in deciding upon the government's position in this Court, the Solicitor General deems it appropriate to state that upon inquiry he is personally satisfied both that the challenge to the integrity of the government agents is unjustified and that the new materials do not warrant his consent to a motion for a new trial. The partial recantation relied upon has been repudiated by Cantellops as the product of duress and bribery, and the circumstances surrounding its procurement have been the subject of a grand jury inquiry in the Southern District of New York. When the matter is properly presented for judicial decision before the appropriate tribunal, the district court, the circumstances which have led to the conclusion that a new trial is not warranted will be fully presented. Cf. *Harrison* v. *United States*, 191 F. 2d 874, 886 (C.A. 5).

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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APRIL 1960.

U. S. GOVERNMENT PRINTING OFFICE: 1960